118-682

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1147~~ 749

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY, APPELLANT,

vs.

BENJAMIN HARRIS BREWSTER, ATTORNEY GENERAL OF THE UNITED STATES, FOR AND ON BEHALF OF THE UNITED STATES OF AMERICA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 19, 1885.

gage act. In some States (Wisconsin, Minnesota and perhaps others), a chattel mortgage act existed, and conditional sales were held good, and special acts were passed requiring the recording of such contracts for sale.

These conditional contracts have been for many years in general use among business men, and in places where no chattel mortgage law existed, and large dealings have been made in reliance on them. In many parts of the mountain country where counties are as large as States, a chattel mortgage law is only an incumbrance to trade and not adequate to meet the wants of dealers, and as condition sales can only extend to the purchase price of property, a claim always favored, no detriment can arise from giving them a favorable construction to carry out the intent of the parties.

CHAS. W. BENNETT,
Atty. for Appellee.

118-682

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	Original.	Print.
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	Original.	Print.
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1 In the Circuit of the United States for the District of Kansas.

To the judges of the circuit court of the United States for the district of Kansas:

Your orator, Benjamin Harris Brewster, Attorney General of the United States of America, for and on behalf of the United States of America brings this his bill against the Kansas City, Lawrence and Southern Railroad Company, a corporation organized under the laws of the State of Kansas, and thereupon your orator complains and alleges that on and for a long time prior to the 19th day of May, in the year of our Lord one thousand eight hundred and seventy-three, your orator was the owner and in the exclusive possession of certain lands (hereinafter described), which said lands had been duly surveyed and were public lands of the United States, and as such were subject to purchase by actual settlers, and to homestead and preemption entry under the laws enacted by the Congress of the United States.

Your orator further alleges and shows to the court that, pursuant to the said laws enacted by the Congress of the United States, a large number of actual and *bona fide* settlers went upon said lands, and, having all the qualifications required by said laws, made settlement and lasting and valuable improvements thereon, and now occupy the said lands as their homes, and are entitled, upon payment therefor, to receive patents for the same from your orator.

The lands herein mentioned are described as follows, to wit:

2 Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w s e	13	24	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½, n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
W ½, n w, s e, & e ½ s e	35	25	20
S ½	19	25	21
W ½	29	25	21
All	31	25	21
All	1	26	20
N ½ s w ¼, w ½ s e & n e s e	3	26	20
All	5	26	20
E ½, n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20

Subdivisions.	Sec.	T's.	R'e.
All	13	26	20
All	15	26	20
All	17	26	20
E ½ n e & e ½ s e ¼	19	26	20
E ½ e ½ s w & s w s w	21	26	20
All	23	26	20
3 Lots 1 & 2	25	26	20
Lots 1 & 2	27	26	20
Lots 1 & 2	29	26	20
W ½	5	26	21
All	7	26	21
W ½, n e ¼, w ½, s e ¼, & w ½	17	26	21
All	19	26	21
Lots 1 & 2	29	26	21

All of which said lands are situated in the county of Allen and State of Kansas.

But now, so it is, may it please your honors, that the said defendant, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, the said defendant denies your orator's interest and title in and to said lands, and denies the right of said *bona fide* settlers to occupy said lands and to perfect their titles by payment to your orator of the purchase price thereof, and denies the right of said settlers to receive patents therefor from your orator upon such payment being made.

And the said defendant sometimes pretends that under a certain act of Congress, approved March 3, 1863, and another act of Congress, approved July 26, 1866, said lands hereinbefore described were granted to aid in the construction of certain railroads, among which the said defendant claims were the Leavenworth, Lawrence and Fort Gibson Railroad, the Atchison, Topeka and Santa Fe Railroad,
4 and the Union Pacific Railroad, Southern Branch; and the defendant claims that, by virtue of said last-mentioned acts of Congress, and a certain act of the Legislature of the State of Kansas, approved February 9th, 1864; a certain other act of the Legislature of the State of Kansas, approved February 23d, 1866; a certain other act of the Legislature of the State of Kansas, approved February 26, 1867, and by virtue of a certain patent hereinafter particularly described, and of certain assignments and conveyances from said Union Pacific Railroad Company, Southern Branch, and said Atchison, Topeka and Santa Fe Railroad Company, and as successor of the said Leavenworth, Lawrence and Fort Gibson Railroad Company, it has become and is the owner of all the lands hereinbefore described, whereas your orator charges the contrary thereof to be the truth; that the defendant is the successor of the said Leavenworth, Lawrence and Fort Gibson Railroad Company, the name of said last-named railroad company having been changed to that of Leaven-

worth, Lawrence and Galveston Railroad Company, and afterwards to that of Kansas City, Lawrence and Southern Kansas Railroad Company, which name it now bears, and said defendant has succeeded to the rights of said companies, the names of which have been changed as aforesaid.

And your orator further charges that on the 5th day of May, 1863, the Commissioner of the General Land Office of the United States transmitted to the register and receiver of the United States land office at Humboldt, Kansas, in which district said lands were situated, a diagram of the probable route of the said Leavenworth, Lawrence and Galveston railroad, and an order withdrawing all the lands hereinbefore described from market, pursuant to the said act of Congress, approved March 3d, 1863, a copy of which order of withdrawal is hereunto annexed, marked "Exhibit A;" and your orator prays that said copy may be taken and considered as a part of this bill of complaint; that by said diagram of the probable line of said railroad, upon which said withdrawal was based and ordered, the land in controversy came and was included within the first ten-mile limit of said last-named railroad, and was accordingly withdrawn from homestead and pre-emption entry, and reserved for the benefit of said last-named railroad, and remained so withdrawn and reserved for ten years thereafter.

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And your orator further charges that the said Leavenworth, Lawrence and Galveston railroad was not constructed upon the line defined by the diagram transmitted in the order of the Commissioner of the General Land Office, marked "Exhibit A," but was constructed upon a different line, and on the 10th day of May, 1867, the Commissioner of the General Land Office transmitted to the said register and receiver another diagram showing the actual location of said railroad, by which diagram the lands hereinbefore described were shown to be more than ten miles from the line of said railroad, but within twenty miles therefrom, and by said order the said lands were directed to be withdrawn and reserved as within the indemnity limits of, and as indemnity lands to, said last-named railroad company under said act of Congress approved March 3d, 1863, and said lands were withdrawn and reserved accordingly. A copy of said last-mentioned order of the Commissioner of the General Land Office is hereunto annexed, marked "Exhibit B," and your orator prays that the said copy may be taken and considered as a part of this bill of complaint.

And your orator further charges that on the 3rd day of April, 1867, and while all the lands hereinbefore described were withdrawn and reserved for the benefit of the said Leavenworth, Lawrence and Galveston Railroad Company under said act of Congress of March 3d, 1863, the said Commissioner of the General Land Office transmitted to the said register and receiver a diagram of the route of said Union Pacific Railroad Company, Southern Branch, (the name of which said company had been changed to the Missouri, Kansas and Texas Railway Company,) and by his order of that date directed the withdrawal, for the benefit of said last-named railroad company, of all odd sections not previously

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reserved for twenty miles on each side of said route, pursuant to the provisions of said act of Congress, approved July 26th, 1866. A copy of said order of the Commissioner is hereunto annexed, marked "Exhibit C;" and your orator prays that said copy may be taken and considered as a part of this bill of complaint; that the lands hereinbefore described were situated more than ten miles and less than twenty miles from the route of said Missouri, Kansas and Texas railway, as defined by said last-mentioned diagram, but the same lands having been previously reserved under said act of Congress of March 3, 1863, for the benefit of said Leavenworth, Lawrence and Galveston railroad, were not subject to the operation of said act of Congress of July 26th, 1866, or of said last-mentioned order of the Commissioner directing the withdrawal of lands thereunder.

And your orator further alleges that the said Leavenworth, Lawrence and Galveston Railroad Company did not, within ten years, construct its road from Leavenworth to Lawrence, nor its branch "from Lawrence by the valley of the Wakarusa river to the point on the Atchison, Topeka and Santa Fe railroad where said road intersects the Neosho river," nor has said road from Leavenworth to Lawrence, or said branch, ever been constructed as required by the said act of Congress of March 3rd, 1863, and said act of the
7 Kansas Legislature of February 9th, 1864; and the Commis-
missioner of the General Land Office, on the 8th day of October, 1874, adjudged that, by reason of the failure of said Leavenworth, Lawrence and Galveston Railroad Company to construct said road and branch, it had forfeited and was not entitled to any of the lands hereinbefore described, or to any indemnity lands whatever under said act of Congress of March 3rd, 1863; whereupon the said lands reverted to your orator, and became and ever since have been public lands, and by act of Congress, approved July 26th, 1876, were restored to sale and settlement under the pre-emption and homestead laws of the United States.

And your orator further charges that the Atchison, Topeka and Santa Fe Railroad Company, on the 19th day of March, 1866, in consideration of one dollar, assigned its rights, franchises, and land grant under said act of March 3d, 1863, for its Neosho Valley Branch to the said Missouri, Kansas and Texas Railroad Company; and on the 26th day of February, 1867, the Legislature of the State of Kansas, by resolution approved of that date, ratified said assignment, but the branch of the Atchison, Topeka and Santa Fe railroad required by the said act of Congress of March 3rd, 1863, and of the Kansas Legislature of February 9th, 1864, to be constructed "down the Neosho Valley to the point where the Leavenworth, Lawrence and Galveston railroad enters said valley" was not constructed within ten years, nor has the same ever been constructed, and no part of the lands hereinbefore described is situated within twenty miles of either side of any railroad constructed by said Atchison, Topeka and Santa Fe Railroad Company, nor did any part of said land pass to said Missouri, Kansas and Texas railway by virtue of said assignment and said resolution of the Legislature of the State

of Kansas. But your orator further charges that the said
8 Missouri, Kansas and Texas Railway Company, claiming as the assignee of said Atchison, Topeka and Santa Fe Railroad Company, and the said Leavenworth, Lawrence and Galveston Railroad Company, claiming by virtue of said act of Congress of March 3, 1863, notwithstanding the failure to construct said roads and branches, on the 8th day of August, 1872, jointly selected certain lands, among which are the lands hereinbefore described as indemnity lands, which they claimed under the said act of Congress approved March 3d, 1863; that thereupon, and on the said 8th day of August, 1872, the register and receiver of said land office certified said selections to the Commissioner of the General Land Office, and on the 17th day of December, 1872, the said Leavenworth, Lawrence and Galveston Railroad Company filed in the said Commissioner's Office an assignment, dated December 13th, 1872, relinquishing all its right, title, and interest in the lands so jointly selected as indemnity to the Missouri, Kansas and Taxas Railroad Company, its successors and assigns, and requesting that patents issue to the said Missouri, Kansas and Texas Railroad Company.

And your orator further charges that, pursuant to said selection and assignment, but without authority of law, on the 19th day of April, 1873, the Commissioner of the General Land Office certified the lands embraced in said joint selection, including all the lands hereinbefore described, to the State of Kansas, for the benefit of the Missouri, Kansas and Texas Railroad Company, under said act of Congress approved March 3rd, 1863, and on the 19th day of May, 1873, Thomas A. Osborn, Governor of the State of Kansas, issued to said Missouri, Kansas and Texas Railroad Company a patent for said lands, a copy of which patent is hereunto annexed, marked "Exhibit D;" and your orator prays that said copy may be taken and considered as a part of this bill of complaint.

9 And your orator further charges that the said Missouri, Kansas and Texas Railroad Company received the full grant of lands donated to it by the act of July 26th, 1866; that the United States has never issued a patent for the lands hereinbefore described to the Missouri, Kansas and Texas Railway Company, or any other corporation or person, and the only title said Missouri, Kansas and Texas Railroad Company has to said lands is such as it may claim by virtue of the said patent so issued by the Governor of the State of Kansas, but your orator further charges that the said Missouri, Kansas and Texas Railroad Company, on the 9th day of October, 1871, executed to the Leavenworth, Lawrence and Galveston Railroad Company a deed for all the lands hereinbefore described, a copy of which deed is hereto annexed, marked "Exhibit E;" and your orator prays that said copy may be taken and considered as a part of this bill of complaint. Said deed was recorded in the office of the Register of Allen county, Kansas, on the 10th day of October, 1871, in book H of deeds, on page 593. And the said Missouri, Kansas and Texas Railroad Company, on the 8th day of February, 1872, executed to the Leavenworth, Lawrence and Galveston Railroad Company a deed for the said lands, a copy of which deed, marked

"Exhibit F," is hereto annexed. And your orator prays that said copy may be taken and considered as a part of this bill of complaint. Said deed is recorded in the office of the register of deeds of Allen county, Kansas, in book K of deeds, at page 320; that the defendant herein is the successor of said Leavenworth, Lawrence and Galveston Railroad Company, and the only title said defendant has is such as it may claim through said patent and said last-mentioned deeds.

And your orator further charges that the certification of
10 said lands by the Commissioner of the General Land Office to the State of Kansas on the 19th day of April, 1873, for the benefit of the said Missouri, Kansas and Texas Railroad Company was made without authority of law, and the patent so issued to said Missouri, Kansas and Texas Railway Company by the Governor of the State of Kansas was issued without authority of law, and said certification and patents are null and void, are contrary to equity, and are to the manifest wrong and injury of your orator.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator prays that this honorable court may order, adjudge, and decree that the legal title in and to the said lands claimed as aforesaid by the said defendant is vested in your orator, and of right belongs to your orator, and that said certification of said lands by the Commissioner of the General Land Office to the State of Kansas for the benefit of said Missouri, Kansas and Texas Railroad Company, and said patent from the Governor of the State of Kansas to the said Missouri, Kansas and Texas Railroad Company for said lands, annexed hereto as Exhibit "D," be decreed null and void and without authority of law, and that they constitute a cloud on the said legal title of your orator, and that the same be removed, and that the said defendant be perpetually enjoined from setting up any claim, either in law or in equity, in or to any of said lands, and that your orator may have such further and other relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet. And may it please your honors to
11 grant to your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the Kansas City, Lawrence, and Southern Kansas Railroad Company, defendant, commanding it, on a day certain to be therein named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to and perform and abide such further order, direction, and decree as may be made against it.

And your orator, as in duty bound, will ever pray, &c.

BENJAMIN HARRIS BREWSTER,
Attorney General of the United States of America.
J. R. HALLOWELL,
United States Attorney for the District of Kansas.

C. F. HUTCHINGS,
Of Counsel.

EXHIBIT A. (Received at Humboldt May 5, 1863.)

GENERAL LAND OFFICE, *March* 19, 1863.

Register and receiver, Humboldt, Kansas.

GENTLEMEN: The act of Congress approved March 3, 1863, makes a grant of alternate sections of land to Kansas to aid in the construction, "first, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence and via the Ohio City crossing of the Osage river, to the southern line of the State," "with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fe railroad where said road intersects the Neosho river; second, from Atchison, via Topeka, to the
12 western line of the State in the direction of Fort Union," &c., "with a branch from where this last-named road crosses the Neosho down said Neosho Valley to the point where the said first-named road enters the said Neosho Valley."

This law concedes "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads and each of its branches."

The first section further provides that where lands thus granted have been sold, reserved, or otherwise appropriated, or the rights of pre-emption or homestead settlements have attached, other lands designated by odd numbers, in no case to be located further than twenty miles from the lines of said roads and branches, shall be selected by direction of the Secretary of the Interior, &c.

The second section requires the reserved (even) sections within the ten-mile limits to be sold at not less than double the minimum price of the public lands. No such section can, however, be sold at private entry until after it shall have been first offered at or above the increased minimum price, "provided that actual *bona fide* settlers under the provisions of the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation, and occupation as now provided by law, purchase the same at the increased minimum price aforesaid; and provided, also, that settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy, and cultivate the same for a period of five years and comply with the several conditions and requirements of said act shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

13 The Senators and Representatives in Congress from Kansas have requested the withdrawals of the lands along the lines or routes of the railroads and branches provided for in this act. I enclose a diagram showing the probable lines of said roads and branches, with the ten-mile limits on each side (colored green), and you are hereby directed to withhold from ordinary private sale or location, and also from pre-emption and homestead, with the qualification hereinafter indicated, all the public lands in your district and lying within the ten-mile limits as designated on said diagram.

Where said lines pass through the surveyed lands the register will proceed at once to lay down, in leadpencil, on the township

plat the ten-mile limits of the reserve on each side thereof, and make the proper notes thereon, showing that the lands embraced within said limits are reserved from sale or entry; and as the surveys progress and the township plats are received he will proceed in like manner to lay down the limits of the reservation and make similar notes, and immediately report the same to this office, so that this order may be strictly observed by withholding the land in said limits.

In virtue, however, of the laws of 1853 and 1854, interests of two classes of settlers are provided for and protected, to wit:

1st. By the said act of March 27th, 1854 (volume 10, page 269), pre-emptors either upon the odd or even sections who had actually settled before the receipt at your office of this order of withdrawal have the right, upon establishing their claims according to law, to pay for them at $1.25 per acre, or in virtue of March 22nd, 1852, to locate the same with warrants.

2nd. In accordance with the said act of March 3rd, 1853 (volume 10, page 244), any pre-emptor who, subsequent to the receipt as aforesaid of the order of withdrawal and prior to the final allot-
14 ment of the alternate sections to the railroad, may settle upon and improve the even numbered (not odd) sections, and who shall establish their pre-emptions according to law, have a right to do so before the same are offered at public sale, rating the land at $2.50 per acre, with the right to pay for the same in cash or as stipulated in the last proviso to the first section of act of March 22nd, 1852 (volume 10, page 3), to pay part in warrants at $1.25 and the residue in cash.

I would also call your attention to the first section of the homestead act, wherein it is provided "that any person," &c., &c., "shall" be entitled to enter one quarter section or a less quantity of unappropriated public land upon which said person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at $1.25 or less per acre, or eighty acres or less of such unappropriated lands at $2.50 per acre, &c.

You will, therefore, understand from the foregoing—

1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, pre-emption, or homestead entry, except so far his inceptive rights may have accrued prior to the receipt by you of this order.

2nd. That under the provisions of the acts of 1853 and 1862 the even sections will only be subject to pre-emption at $2.50 per acre from that date, and dealt with at that ratability under the homestead.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

15 EXHIBIT B. (Received at Humboldt May 10, 1867.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 30, 1867.

Register and receiver, Humboldt, Kansas:

Under date of March 19, 1863, I transmitted to you a diagram showing the designated line of route, with the ten-mile or granted limits, of the Leavenworth, Lawrence & Galveston railroad, for which a grant of lands is made to Kansas by the act of Congress approved March 3rd, 1863.

By my letter accompanying the diagram I ordered, with the approval of the Secretary, that the odd sections within aid limits should be withheld from further sale or location, pre-emption or homestead entries, except where inceptive pre-emption rights had attached prior to withdrawal, and directed that the even sections should be held subject to the pre-emption and homestead entry at $2.50 per acre.

Herewith I enclose a map of the actual location of the route of said road, with that portion of the ten and twenty mile limits designated with sectional lines as falling within your district. You will now withhold from sale or location, pre-emption, or homestead entries all the odd sections within the limits of twenty miles, as laid down on the accompanying diagram, the even sections within the ten-mile limits being held at $2.50, as under the former withdrawal.

Where settlements may be shown to have been made upon an even section falling without the lines of the ten-mile limits as originally withdrawn, and within the ten-mile limits as shown on the present diagram, you will allow the party to prove up and pay for
16 the land at the ordinary minimum price, provided said settlement was made prior to the receipt by you of this order of withdrawal; and for your guidance in this matter I have marked on the diagram the line of original withdrawal; also, where a settlement may have been made on an odd-numbered section outside of the ten and within the twenty-mile limits prior to the receipt by you of this order of withdrawal the settler will be protected in his rights by reason of such prior settlement.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

EXHIBIT C. (Received at Humboldt April 3, 1867.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 19, 1867.

Register and receiver, Humboldt, Kansas.

GENTLEMEN: Under the act of Congress approved July 20th, 1866 (Pamph. Laws 1866, page 289), there is granted to Kansas to aid in the construction of a railroad by the "Union Pacific Railroad Company, Southern Branch," from Fort Riley, Kansas, or near said military

reservation, thence down the valley of the Neosho river to the southern line of the State "every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile, and where any of said sections have been reserved, sold, pre-empted, or otherwise disposed of by the United States,
17 then there is to be reserved, "for the purposes aforesaid," "from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated," &c., provided "that said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

The second section of the act increases the price of the even sections within ten miles on each side of said road to double the minimum price, provided that actual *bona fide* settlers under the pre-emption laws may, upon due proof, &c., purchase the same at the price fixed for said land at the date of settlement, and provided that homestead settlers may take eighty acres each of such double minimum lands.

The fourth section requires that the lands granted shall be withdrawn as soon as the company shall file a map of its line of route.

The company having duly filed a line of route in this office, through the secretary of the interior, I enclose a diagram of that part coming within the limits of your district with the ten and twenty mile limits on each side of the road laid down thereon.

You will upon its receipt proceed to mark on your plats the limits as thereon designated, and will reserve from sale, location, or entry of any kind, except in case of *bona fide* pre-emptions initiated prior to withdrawal, all the odd-numbered sections within the ten-mile limits, and all the vacant lands between the ten and twenty mile limits.

The even sections within the ten mile or granted limits you will withdraw from private entry, and the same will [be] only subject to pre-emption and homestead entry at the rate of $2.50 per acre until regularly offered at public sale, except in cases of *bona fide* pre-emptions where settlement was made prior to this withdrawal, wherein
18 the party may make proof and pay for the same at $1.25 per acre.

Be pleased to acknowledge the date of receipt of this, from which time the same becomes effective.

Very respectfully,

JOS. S. WILSON,
Commissioner.

EXHIBIT D.

The State of Kansas to all to whom these presents shall come, Greeting:

Whereas the Missouri, Kansas and Texas Railway Co., having constructed a railroad and telegraph line from Junction City to the southern boundary of the State of Kansas, is entitled under the provisions of the act of Congress approved March 3, one thousand eight hundred and sixty-three (1863), entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the

construction of certain railroads and telegraphs in said State," and of the act of the Legislature of the State of Kansas approved February 9th, one thousand eight hundred and sixty-four (1864), entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such railroads and telegraphs," to the following-described tracts of land as certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior April 10th, one thousand eight hundred and seventy-three (1873), said to contain twenty-seven thousand seven hundred and thirty-two and $\frac{50}{100}$ acres, namely:

19 Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w ½ s e	13	24	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½, n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
W ½, n w, s e, & e ½ s e	35	25	20
S ½	19	25	21
W ½	29	25	21
All	31	25	21
All	1	26	20
N ½ s w ¼, w ½ s e, & n e s e	3	26	20
All	5	26	20
E ½ n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20
All	13	26	20
All	15	26	20
All	17	26	20
E ½ n e & e ½ s e ¼	19	26	20
E ½ e ½, s w & s w sw	21	26	20
All	23	26	20
Lots 1 & 2	25	26	20
Lots 1 & 2	27	26	20
Lots 1 & 2	29	26	20
W ½	5	26	21
All	7	26	21
W ½ n e ¼, w ½ s e ¼, & w ½	17	26	21
All	19	26	21
Lots 1 & 2	29	26	21

Know ye, that the State of Kansas, in the consideration of the premises and in conformity with the said laws, has given and granted, and by these presents does give and grant, unto the Missouri, Kansas and Texas Railway Company and assigns the said tracts above described; to have and to hold the same, together with all
20 rights, privileges, immunities, and appurtenances of whatsoever nature accruing under the provisions of the laws relating thereto, and in accordance with the act of Congress of March 3d, 1863, set forth in the foregoing, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing.

In testimony whereof I, Thomas A. Osborne, Governor of the State of Kansas, have caused these letters to be made patent and the seal of the State to be hereunto affixed. Given under my hand, at the city of Topeka, this nineteenth (19) day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh, and of the thirteenth year of the State.

THOMAS A. OSBORN.

By the Governor:

[L. S.] W. H. SMALLWOOD,
Secretary of State.

EXHIBIT E.

Know all men by these presents that the Leavenworth, Lawrence and Galveston Railroad Company and the Missouri, Kansas and Texas Railroad Company, by their agreement made and entered into February 20th, A. D. 1871, and said agreement having been duly and subsequently ratified by the boards of directors of said companies, did determine upon the basis of a partition of certain lands situated in the State of Kansas, and granted to said companies by the United States and by the State of Kansas, the said State having received the same from the United States, and lying within the conflicting land grant limits of the roads of said companies in said State of Kansas, and inasmuch as the partitions and divisions of said lands contemplated in said agreement has been made,
21 so far as the lands hereinafter mentioned are concerned, to the mutual satisfaction of said companies:

Now, therefore, in pursuance of said agreement, and in consideration of one dollar to be in hand paid, the said Missouri, Kansas and Texas Railroad Company, party of the first part, doth grant, bargain, sell, release, and quit-claim unto the said Leavenworth, Lawrence and Galveston Railroad Company, party of the second part, the following tracts of land lying and being situate in the State of Kansas, to wit:

Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w ½ s e	13	21	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20

Subdivisions.	Sec.	T's.	R'e.
All	3	25	20
All	13	25	20
All	15	25	20
E ½ n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
W ½ n w, s e & e ½ s e	35	25	20
S ½	19	25	21
W ½	29	25	21
All	31	25	21
All	1	26	20
N ½ s w ¼, w ½ s e, & n e s e	3	26	20
All	5	26	20
E ½ n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20
All	13	26	20
All	15	26	20
All	17	26	20
E ½ n e & e ½ s e ¼	19	26	20
E ½ e ½, s w & s w s w	21	26	20
All	23	26	20
Lots 1 & 2	25	26	20
Lots 1 & 2	27	26	20
Lots 1 & 2	29	26	20
W ½	5	26	21
All	7	26	21
W ½ n e ¼, w ½ s e ¼, & w ½	17	26	21
All	19	26	21
Lots 1 & 2	29	26	21

22 In Allen county; and the said party of the first part doth hereby covenant and agree to and with the party of the second part that it has not made, suffered, or caused to be made any conveyance, lien, or incumbrance of any nature whatsoever on the above-described lands, or any part thereof, and that it will forever warrant and defend the title to said lands, and every part thereof, against all persons whomsoever claiming by, through, or under the party of the first part, but against none other; and the party of the first part further covenants and agrees to and with the party of the second part that this instrument shall operate to convey to the party of the second part any other or further title that the party of the first part may hereafter acquire or receive through, by, or in virtue of any law of the United States, or of the State of Kansas, or treaty of the United States with any Indian tribe, to said above-described lands, or any part thereof; and hereby further covenants

any nature whatsoever, excepting the mortgages or trust deeds hereinbefore mentioned, on the — above-described, or any part thereof, and that it will forever warrant and defend the title to said lands, and every part thereof, against all persons whomsoever claiming by, through, or under the party of the first part, but against none other; and the party of first part further covenants and agrees to and with the party of the second part that this instrument shall operate to convey to the party of the second part any other or further title that the party of the first part may hereafter acquire or receive through, or by or in virtue of any law of the United States, or of the State of Kansas, or treaty of the United States with any Indian tribe, to said above-described lands, or any parcel thereof, and hereby agrees, covenants and *agrees* to execute and deliver to said party of the second part, its successors and assigns, any further assurance or conveyance which may be necessary to carry out and effectuate the object and purpose of this instrument; and the said Russel Sage and N. A. Cowdry, trustees, as aforesaid, and the Union Trust Company of New York, also trustees as aforesaid, do by these presents, under
26 and by virtue of the mortgages or trust deeds heretofore referred to, and in consideration of the premises aforesaid, release and convey to the said party of the second part all their right, title, and interest, property, possession, claim, demand, and estate of the said trustees in and to the above granted premises in accordance with the terms and conditions of said mortgages or trust deeds.

This release on the part of the aforesaid trustees is made for the purpose of carrying into effect a compromise or settlement of conflicting claims to portions of the mortgaged premises by said railroad companies.

In witness whereof the said Missouri, Kansas and Texas Railway Company and the Union Trust Company of New York have caused these presents to be signed by their respective presidents and secretaries, with the seals of the respective corporations attached, and the said Russel Sage and N. A. Cowdry, trustees, have hereunto set their hands and seals the day and year first above written.

[L. S.] LEVI PARSONS,
President of the Missouri, Kansas & Texas R. R. Co.

Attest: H. B. HENSON,
Secretary of the Missouri, Kansas and Texas R. R. Co.

[SEAL.] UNION TRUST COMPANY
OF NEW YORK,
By J. N. FROTHINGHAM, *President.* [L. S.]
C. T. CARLTON, *Secretary.* [L. S.]
RUSSEL SAGE, [L. S.]
N. A. COWDRY, *Trustees.* [L. S.]

(The acknowledgment of the above instrument follows here.)

27 Endorsed: No. 4118. Circuit court of the United States for the district of Kansas. Benjamin Harris Brewster, Attorney

General of the United States of America, for and on behalf of the the United States of America, complainant, against Kansas City, Lawrence and Southern Kansas Railroad Company, defendant. Bill of complaint. Filed Jan. 25, 1883. A. S. Thomas, clerk. Benjamin Harris Brewster, Attorney General. J. R. Hallowell, U. S. att'y, district of Kansas.

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Attorney General of the United States of America, for and on behalf of the United States of America,

vs.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY.

I hereby enter an appearance for the defendant in the above-entitled suit.

S. O. THACHER,
Solicitor for Defendant.

Endorsed: No. 4118. Benj. H. Brewster *vs.* Kan. City, Lawrence & Southern Kan. R. R. Co. Appearance of def't. Filed Feb. 22, 1883. A. S. Thomas, clerk.

28 In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Attorney General of the United States for and on behalf of the United States of America, Complainant,

vs.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY, Defendant.

The answer of the Kansas City, Lawrence and Southern Kansas Railroad Company to the bill of complaint of Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States of America.

The said defendant, reserving to itself all right of exception to the said bill of complaint, now comes and answers the said bill of complaint as fully and completely as it is advised it ought to do.

This defendant, answering, shows to the court that it admits that it is a corporation, and that it has succeeded to the rights of the Leavenworth, Lawrence and Galveston Railroad Company in and to the lands in the bill described, and that said Leavenworth, Lawrence and Galveston Railroad Company received said lands from the Missouri, Kansas, and Texas Railroad Company under and by virtue of the deeds, copies whereof are attached to the said bill of complaint and marked Exhibits "E" and "F." Defendant further admits that Exhibits "A" and "B," "C" and "D," attached to the said bill, are true copies of the originals, as set forth in the said bill.

29 Defendant further admits that it does not claim said lands in any other manner save through the conveyances to the

said Leavenworth, Lawrence and Galveston Railroad Company from the Missouri, Kansas and Texas Railroad Company, as set forth in said Exhibits "E" and "F."

The defendant, further answering the said bill of complaint, expressly denies that there are *bona fide* settlers upon said lands, or ever have been; but the defendant avers and shows to the court that the said Missouri, Kansas and Texas Railroad Company acquired said lands under and by virtue of the acts of Congress, mentioned in the bill, of March third, eighteen hundred and sixty-three, July twenty-sixth, eighteen hundred and sixty-six, and also an act of Congress, approved July first, eighteen hundred and sixty-four, whereby a grant of lands was made to the State of Kansas to enable it to build a railroad northerly from the point where the Atchison, Topeka and Santa Fe railroad crosses the Neosho river to a junction with the Branch Union Pacific railroad, near Fort Riley, Kansas, and also by the acts of the Legislature of the State of Kansas respectively approved February ninth, eighteen hundred and sixty-four, February twenty-sixth, eighteen hundred and sixty-six, February twenty-sixth, eighteen hundred and sixty seven, and a lawful assignment to it by the Atchison, Topeka and Santa Fe Railroad Company, made on or about March nineteenth, eighteen hundred and sixty-six, of all its right to build the railroad down the Neosho Valley, which it had under the act of the Legislature of the State of Kansas approved February ninth, eighteen hundred and sixty-four.

The defendant further states that the said Missouri, Kansas and Texas Railroad Company is the same company that is known in the acts of Congress above referred to and in the acts of the Legislature of the State of Kansas as the Union Pacific railroad, Southern Branch.

Defendant admits that the withdrawal of lands made by the Commissioner of the General Land Office under the date of March nineteenth, eighteen hundred and sixty-three, was made for all the roads and branches indicated in the act of Congress of March third, eighteen hundred and sixty-three; and the defendant avers that at that date there were no definite locations of the routes of any of said roads or branches, and that the lands in question were within the ten-mile limit of the probable lines as designated by the Land Commissioner of both the road first designated in said act of Congress of March third, eighteen hundred and sixty-three, and also the branch down the Neosho Valley; and that afterwards, when the definite location of the routes of these two roads came to be located, said lands fell without the ten-mile limits and within the twenty-mile indemnity limits of each road.

Defendant further avers that the said Missouri, Kansas and Texas Railroad Company proceeded to and did build a railroad down the Neosho Valley in substantial conformity with the act of Congress of March third, eighteen hundred and sixty-three, to a junction with the first road mentioned in said act; that the place where the junction should take place was a matter of contention between the two corporations building said roads, to wit, the Mis-

souri, Kansas and Texas Railroad Company and the Leavenworth, Lawrence and Galveston Railroad Company, and that this contention was as a matter of fact submitted to the decision of the Commissioner of the General Land Office, since it affected the relative rights of each company to lands within the granted limits, and the Commissioner of the General Land Office, September
31 twentieth, eighteen hundred and seventy, decided that said junction should take place where it now is, at or near Chanute, on the south side of the Neosho river, and that the lands accruing to each company should be adjusted on the basis of that point of junction; and this defendant avers that the junction so decided upon is the proper one, and is the natural point of union for two roads built on the general routes defined in said act of March third, eighteen hundred and sixty-three.

The defendant further avers that the said Missouri, Kansas and Texas Railroad Company having become the rightful owner of the land grants of the Atchison, Topeka and Santa Fe Railroad Company as to the said branch down the Neosho Valley, and having also become lawfully possessed of the grant made under the act of Congress of July first, eighteen hundred and sixty-four, and also possessing a grant to all lands not covered in said two last-named acts under the act of Congress of July twenty-sixth, eighteen hundred and sixty-six, did file with the Secretary of the Interior, together with a certificate under the hand of the Governor of the State of Kansas, certified under the seal of the State of Kansas, of the fact of the assignment to it by the Atchison, Topeka and Santa Fe Railroad Company a map showing the definite location of its road down said Neosho Valley and opposite to the lands in the bill mentioned, and this map was accompanied by a statement of the said Missouri, Kansas and Texas Railroad Company (then Union Pacific, Southern Branch): "We claim on behalf of said company all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka and Santa Fe Railroad Company, to which they were granted
32 by the State by an act approved February 9, 1864, accepting said grants; and that we also claim all the lands granted to the State of Kansas for the Union Pacific railway, Southern Branch, by the act of Congress approved July 26, 1866." This map and statement were acted upon by the Secretary of the Interior under date of March twenty-fifth, eighteen hundred and sixty-seven, who then ruled as follows: "In virtue of said assignment and the ratification thereof by the State of Kansas the lands enuring to the State under the said grants of 1863 and 1864 will be adjusted to the State for the benefit of the Union Pacific Railway, Southern Branch, Company, upon the principles heretofore established and now in force, and then, if any lands remain to the United States of odd sections within the limits of twenty miles on each side of the railroad between the termini mentioned, the said Union Pacific Railway, Southern Branch, Company will become entitled to patents for such odd sections, and also to such even sections as remain to the United States

outside of the ten and within the twenty miles of the road upon complying with all the terms, conditions, and stipulations of said act of July 26, 1866;" and thereupon, and on April third, eighteen hundred and sixty-seven, the Commissioner of the General Land Office made the withdrawal of lands mentioned in Exhibit "C" to the bill.

The defendant further avers that the said Missouri, Kansas and Texas Railroad Company, under and in compliance with the said acts of Congress, including that of March third, eighteen hundred and sixty-three, and within the time fixed by all of said acts, completed its road from Junction City, Kansas, near Fort Riley, and from a junction with the Branch Union Pacific railroad down the Neosho Valley along the route fixed for that branch of the Atchison, Topeka and Santa Fe railroad by the act of March third, eighteen hundred and sixty-three, to the south line of the
33 State, crossing at an acute angle the line of the road first mentioned in said act of Congress, and that, in lieu of lands that had been disposed of by the United States within the ten-mile limit under the reservations in said act of Congress, it became entitled as indemnity to the lands mentioned in the bill of complaint, and that at the time it selected and received said lands there was no claim upon them, nor were they reserved to or by the United States for any purpose whatever, but belonged to the public lands of the United States, except as they had been granted under the act of March third, eighteen hundred and sixty-three, and July twenty-sixth, eighteen hundred and sixty-six, and had been reserved to fulfil the conditions of said acts.

Further answering the bill of complaint, the defendant avers that the said Missouri, Kansas and Texas Railroad Company did not and never has received the full amount of lands it was entitled to either under the act of eighteen hundred and sixty-three or eighteen hundred and sixty-four or eighteen hundred and sixty-six, but that by reason of prior grants and disposition of the United States it failed of receiving by many thousand acres the lands it was entitled to by virtue of building its road as specified in said acts of Congress and said acts of the Legislature of the State of Kansas.

This defendant further says that the branch road to be built down the Neosho Valley and the first road mentioned in said act of Congress of March third, eighteen hundred and sixty-three, in their initial points, are a long distance from each other, and that the routes fixed in said act of Congress for each road come together at an acute angle, one route running nearly south while the other, coming down the Neosho Valley, runs in a direction something east of south, and that by the topography of the country the
34 two routes approach each other at such an angle that their respective grants of land overlapped each other, first as to indemnity limits and lastly as to granted limits.

The defendant admits the failure of the said Leavenworth, Lawrence and Galveston Railroad Company to build its road so as to be entitled to any indemnity lands, and the defendant avers that all the lands mentioned in the bill of complaint were properly indem-

nity lands of the said Missouri, Kansas and Texas Railroad Company, and that they were lawfully conveyed to the State of Kansas for the benefit of said company.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said bill charged, without this, that — there is any other matter, cause, or thing in the said complainant's bill of complaint material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently confessed, answered, traversed, and denied, or avoided, is true to the knowledge or belief of this defendant. All which matters and things this defendant is willing to aver, maintain, and prove as this honorable court shall direct; and humbly prays hence to be dismissed, with his reasonable costs and charges in this behalf most wrongfully expended.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY,
By S. O. THACHER, *Its Solicitor.*

Endorsed: No. 4118. In the circuit court of the United States, district of Kansas. Benjamin Harris Brewster, attorney general, &c., *vs.* Kansas City, Lawrence & Southern Kansas R. R. Co. Answer. Filed March 29, 1883. A. S. Thomas, clerk.

35 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the twenty-sixth day of November, A. D. 1883, proceedings were had and appear of record in words and figures following, to wit:

BENJAMIN HARRIS BREWSTER, Attorney General, for and on behalf of the United States,
vs.
KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY. } 4118.

MONDAY, *Dec.* 3, 1883.

On motion, it is ordered by the court that complainant have leave to file replication herein instanter, and also that said complainant have 60 days to file proofs, and that defendant have 60 days thereafter to file proofs.

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Attorney General of the United States, for and on behalf of the United States of America, Complainant.

vs.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY, Defendant.

The replication of Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States
36 of America, complainant, to the answer of the Kansas City, Lawrence and Southern Kansas Railroad Company, defendant.

This repliant saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays as in and by his said bill he has already proved.

BENJAMIN HARRIS BREWSTER,
Att'y Gen'l United States.

J. R. HALLOWELL,
U. S. Att'y, Dist. of Kan.

C. F. HUTCHINGS,
Of Counsel.

Endorsed: No. 4118. Circuit court of the United States. Benjamin Harris Brewster, Attorney General of the U. S., for and on behalf of the U. S. of America, *vs.* The Kansas City, Lawrence and Southern Kansas Railroad Co. Replication. Filed Dec. 13, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

37 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday the twenty-sixth day of November, A. D. 1883, proceedings were had and appear of record in words and figures following, to wit:

BENJAMIN HARRIS BREWSTER, Attorney General, for and on behalf of the United States,
vs.
KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD CO. } 4118.

MONDAY, *Feb.* 4, 1884.

On motion of J. R. Hallowell, Esq., solicitor for said complainant, it is ordered by the court that the time for the said complainant to file proofs herein be and is hereby extended to April 1st, A. D. 1884.

38 *Stipulation.*

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Att'y Gen'l of the United States, for and on behalf of the people of the United States of America, Complainant,

vs.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY, Defendant.

1st. It is hereby stipulated and agreed between the parties hereto that the exhibits attached to the bill and answer herein are true copies of the originals, and shall stand as evidence of the originals without further proof.

2d. The name of the Union Pacific Railroad Company, Southern Branch, was changed to the Missouri, Kansas and Texas Railroad Company, and the latter is the successor of the former.

3d. The L., L. & G. R. R. crosses the M., K. & T. R. R. Co. at Chanute, Kansas; at Colony, Kansas, a point 28 miles north of Chanute, the L., L. & G. R. R. first enters upon lands from which the natural flow of water is by way of the Neosho river.

4. Exhibits "E" & "F," attached to complainant's bill, were recorded in the office of the register of deeds of Allen county, Kansas, at the time alleged in said bill.

5. That the Leavenworth, Lawrence and Galveston Railroad Company never constructed its line from Leavenworth to Law-
39 rence, and never constructed its branch by the Wakarusa river.

J. R. HALLOWELL,
U. S. Att'y.
C. F. HUTCHINGS,
Compl'ts Sol'r.
S. O. THACHER,
Per G. & K.,
Def't's Sol'rs.

Endorsed: No. 4118. In the circuit court of the U. S. Dist. of Ks. Brewster, Att'y Gen'l, &c., *vs.* K. C., L. & S. K. R'y Co. Stipulation. Filed May 3, 1884. A. S. Thomas, clerk.

40 *Stipulation.*

In the Circuit Court of the United States for the District of Kansas.

B. H. BREWSTER, Attorney General, Complainant,

vs.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY, Defendant.

It is agreed by and between the counsel for the above-named parties—

1st. The paper marked "Exhibit A," attached hereto and made a part hereof, is a list of the documentary evidence which will be offered in chief at the hearing of this cause on behalf of the complainant.

2nd. The paper marked "Exhibit B," hereto attached and made a part hereof, is a list of documentary evidence to be offered in chief on the hearing of this cause on behalf of the defendant.

3rd. The paper "Exhibit C," hereto attached and made a part hereof, is a list of the documentary evidence to be offered in rebuttal on the hearing of this cause by the complainant.

4th. The paper "Exhibit D," hereto attached and made a part hereof, is a list of the documentary evidence to be offered in rebuttal on the hearing of this cause by the defendant.

5th. No other evidence than that described in Exhibits A, B, C, and D is to be offered by either party, except the stipulation between the parties filed in this action May 3rd, 1884.

6th. The documentary evidence covered by said list may be filed at the hearing of the cause.

41 7th. The documentary evidence set forth in said list may be inspected and used for the preparation for the hearing by counsel for either party.

8th. All objections to the documentary evidence described in the list are hereby waived, save and except objections to the materiality of such evidence, or any part thereof, which may be made at the hearing.

BENJAMIN HARRIS BREWSTER,
Att'y Gen'l U. S.,
J. R. HALLOWELL, *U. S. Att'y,*
Attorneys for Complainant.
G. W. McCRARY,
JAMES HAGERMAN,
Attorneys for Defendant.

Endorsed: No. 4118. In the circuit court of the United States for the district of Kansas. B. H. Brewster, Att'y Gen'l, Compl't, *vs.* the Kansas City, Lawrence & Southern Kansas R. R. Co., defendant. Stipulation. Filed Dec. 2, 1884. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

42 Ex. "A" with stipulation.

Motion.

In the Circuit Court of the United States for the District of Kansas.

B. H. BREWSTER, Att'y General, Complainant,

vs.

KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD, Defendant.

And now comes the complainant, by his solicitors, and moves the court for an order allowing said complainant to exhibit and read on the final submission of this case, the following documentary evidence:

1. A copy of the diagram of the probable route of the Leavenworth, Lawrence and Galveston railroad, transmitted by the Commissioner of the General Land Office to the register and receiver at Humboldt, Kansas, in a letter of May 5th, 1863; also a copy of said letter, withdrawing lands under act of March 3d, 1863.

2. A copy of the diagram of the same railroad, transmitted by the Commissioner to the office at Humboldt, Kansas, May 10th, 1867; also a copy of the letter accompanying said diagram.

3. A copy of the diagram of the Missouri, Kansas and Texas railway, sent by the Commissioner to the district office at Humboldt, April 3d, 1867, under act of July 26th, 1867 (14 Statutes, 289); also a copy of the letter accompanying said diagram.

4. Letter from Commissioner of the General Land Office, showing that the records of his office failed to show that any diagram was filed in his office showing the location of any line of railroad
43 by the Atchison, Topeka and Santa Fe Railroad Co. down the Neosho Valley to the point where the Leavenworth, Lawrence and Galveston railroad enters said valley—act of Congress, March 3d, 1863 (12 Statutes, 772); also a letter from said Commissioner showing that the records of his office did not show that any order was made or letter filed withdrawing said lands for said Neosho Valley Branch.

5. A copy of the certificate of the Governor of Kansas, dated September 21st, 1871, showing which part of the Leavenworth, Lawrence and Galveston railroad had been constructed.

6. A copy of the order or decision of the Commissioner, dated October 8th, 1874, sent the district officers at Independence, Kansas, and holding that the L., L. and G. R. R. had forfeited all right to indemnity lands.

7. A copy of the selection made August 8th, 1872, by the M., K. and T. R'y, and L., L. and G. R. R. jointly as lands claimed under act of March 3d, 1863, the same being certified the same day, viz., August 8th, 1872, by the register and receiver at Humboldt, Kansas.

8. A copy of the assignment from L., L. and G. R. R. to M., K. and T. R'y, dated December 17, 1872, relinquishing all right to certain lands jointly selected as indemnity lands.

9. A copy of assignment by A. T. and Santa Fe R. R. to M., K. and T. R'y of the former's land grant under act of March 3d, 1863, for its Neosho Valley Branch, dated March 19th, 1866, and ratified by Kansas Legislature February 26th, 1867.

10. A certified copy of the map of the constructed road of the Missouri, Kansas and Texas Railway Co. from Junction City to the northern boundary of the Osage ceded lands; also exemplified copies of the patented lists of lands to said railway company.

44 11. A copy of the letter or order of certification made April 19, 1873, by the Commissioner to the State of Kansas of the lands embraced in the foregoing joint selection for the benefit of the M., K. and T. R'y Company.

12. A copy of the map filed December 2nd, 1866, by the Union Pacific, S. Branch, R. R., required by sec. 4 of act of July 26, 1866.

13. The exhibits referred to in complainant's bill of complaint.

J. R. HALLOWELL, *U. S. Att'y,*
C. F. HUTCHINGS,
CHAS. B. SMITH, *Ass't U. S. Att'y,*
Solicitors for Complainant.

EXHIBIT B with stipulation.

List of Documentary Evidence to be Filed as "Exhibit B" of Stipulation of Counsel of the Respective Parties in Above-entitled Cause on Behalf of the Defendant.

In the Circuit Court of the United States for the District of Kansas.
In Equity.

B. H. BREWSTER, Attorney General,

vs.

KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD.

Memoranda of evidence and list showing title in defendant.

Evidence.

1. Acceptance of the act of Congress of March the 3rd,
45 1863, and of the act of the Legislature of Kansas of February 9th, 1864, by the Atchison, Topeka & Santa Fe Railroad Company.

2. Assignment of 19th of March, 1866, of the Atchison, Topeka & Santa Fe Railroad Company to the Union Pacific Railway Company, Southern Branch of the lands granted by act of Congress of March 3rd, 1863, for Neosho Branch of the first-named company, and an act or resolution of the Legislature of Kansas, Feb'y 26th, 1867, ratifying said agreement.

F.

CDB
1 Ds.

(4-207.)

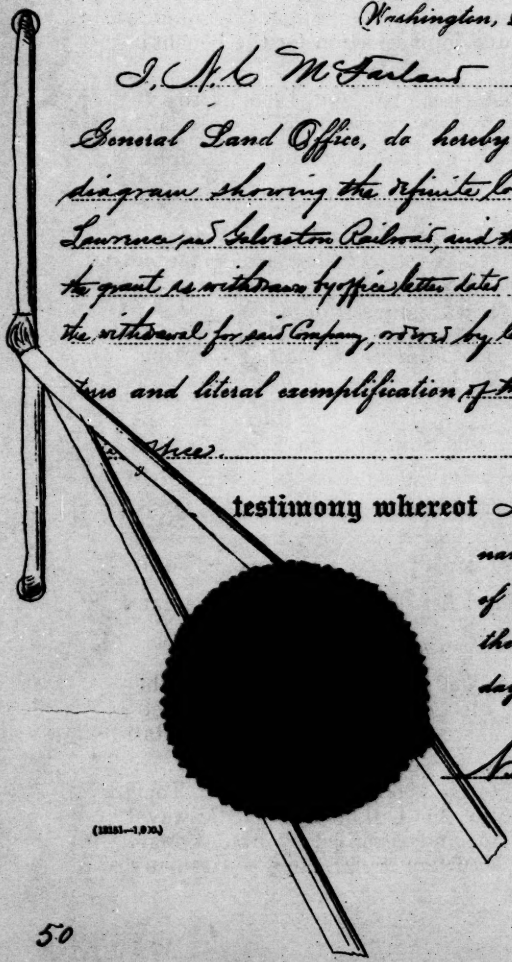
Complainants Proof No 1. and 2 Exhibit A.

Department of the Interior,

GENERAL LAND OFFICE,

Washington, D. C., January 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed diagram showing the definite location of the Leavenworth, Lawrence and Galveston Railroad, and the ten and twenty mile limits of the grant as withdrawn by office letter dated April 30. 1867, also the limits of the withdrawal for said Company, ordered by letter of March 19. 1863 is a true and literal exemplification of the original on file in [illegible] office.



testimony whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

N. C. McFarland
Commissioner of General Land Office.

(12151—1,000.)

50

3. Diagram of the definite location of the line of the road of the Union Pacific Railway Company, Southern Branch, from Fort Riley to the north boundary of the Osage Indian lands, filed with the Secretary of the Interior, December 3rd, 1866.

4. Letter of N. S. Goss, as president and attorney, and John F. Cox, as agent and attorney, of the Union Pacific railway, Southern Branch, dated January 3rd, 1867, in relation to the filing of the map showing the definite location of the Union Pacific railway, Southern Branch.

5. Letter of O. H. Browning, Secretary of the Interior, dated January 7th, 1867, replying to above letter of Goss and Cox.

6. Letter of said Goss and Cox, dated January 31st, 1867, to Hon. O. H. Browning, Secretary of the Interior, enclosing a certified copy of the assignment of the Atchison, Topeka and Santa Fe Railroad Company to the Union Pacific Railway Company, Southern Branch.

7. Copy of letter of General Land Office, dated March 19th, 1867, addressed to the register and receiver at Humboldt, Kansas, and directing them to withhold from entry and sale, for the benefit of the grant of July 26th, 1866, certain lands in the limits of said grant in their district; and also a copy of the diagram attached to said letter.

8. Copy of the decision of Hon. O. H. Browning, Secretary
46 of the Interior, dated March 25th, 1867, directing a withdrawal of lands for the benefit of the Union Pacific Railway Company, Southern Branch. Letter directed to Hon. John H. Wilson, Commissioner of the General Land Office.

9. Letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25th, 1870, and map therewith, duly certified by the Governor of the State of Kansas that the Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of Kansas.

10. Copy of list of lands selected August 8th, 1872, by the Missouri, Kansas and Texas Railway Company and the Leavenworth, Lawrence and Galveston Railroad Company, jointly, under the acts of Congress approved March 3d, 1863, and July 26th, 1866.

11. Copy of lists of lands, with relinquishment of the Leavenworth, Lawrence & Galveston Railroad Company to the Missouri, Kansas & Texas Railway Company, dated December 13th, 1872. The relinquishment is in words and figures, as follows:

"For the purpose of partition, the Leavenworth, Lawrence & Galveston Railroad Company, by the hand of the president and over the seal of the company, hereby relinquish all the right, title, and interest in and to the afore-described lands embraced in Independence joint indemnity list No. 3, to the Missouri, Kansas & Texas Railway Company, their successors and assigns, and request that patents therefor may issue to said Missouri, Kansas & Texas Railway Company."

12. List of lands and the certificate of Willis Drummond, Commissioner of the General Land Office thereto, to which the Missouri, Kansas & Texas Railway Company is entitled, as within its
47 indemnity limits, under act of Congress, March 3d, 1863; said certificate dated April 7th, 1873, approved by Secretary of the Interior April 10th, 1873, and certified by Willis Drummond, Land Commissioner, April 12th, 1873.

13. The letter from the Land Office to the Governor of Kansas, forwarding the certified list and certificate mentioned in last paragraph.

14. Patent of State of Kansas to Missouri, Kansas & Texas Railway Company, dated 19th of May, 1873, "Exhibit D" with bill.

15. Missouri, Kansas & Texas Railway Company deed to Leavenworth, Lawrence & Galveston Railway Company, dated 9th of October, 1871, "Exhibit E" to bill.

16. A further deed of Missouri, Kansas & Texas Railway Company and Russel Sage and N. A. Cowdry to the Leavenworth, Lawrence & Galveston Railroad Company, dated 28th of February, 1872.

17. Copy of letter of General Land Office, dated October 8th, 1874, addressed to the register and receiver at Independence, Kansas, advising them that the Leavenworth, Lawrence & Galveston Railroad Company have failed to file proof of the completion of its road, and that a forfeiture results.

18. Letter of Acting Commissioner of the General Land Office, dated October 29th, 1884, to Britton & Gray, giving the acreage of lands patented and certified, within granted limits and within indemnity limits, to the Missouri, Kansas & Texas Railway Company, under the grant of July 26th, 1866; also the granted and indemnity limits of the Osage lands lost by the decision of the Supreme Court of the United States.

19. Letter of Acting Commissioner of the General Land Office, dated November 1st, 1884, to Messrs. Britton & Gray, giving acreage of the lands certified and patented, within granted limits and indemnity limits, to the Missouri, Kansas & Texas Railway Com-
48 pany, or to the State of Kansas for its use, under the acts of March 3d, 1863, and July 1st, 1864; also the Osage lands, within granted limits and indemnity limits, lost by the decision of the Supreme Court of the United States.

20. A copy of the decision of the General Land Office, of September 15th, 1870, on the question of the right of the Missouri, Kansas & Texas Railway Company and the Leavenworth, Lawrence & Galveston Railroad Company to lands in Kansas under the act of March 3d, 1863, contained in a letter of Joseph S. Wilson, commissioner, to Messrs. T. & C. Ewing, attorneys, Leavenworth, Lawrence & Galveston Railroad Company.

21. The acceptance of the act of July 26th, 1866, by the Missouri, Kansas and Texas Railroad Company.

22. The resolution changing name of the Union Pacific, Southern Branch, to Missouri, Kansas & Texas railroad from pamphlet of the Missouri, Kansas & Texas Railroad Company.

G. W. McCRARY,
JAMES HAGERMAN,
Attorneys for Defendants.

EXHIBIT "C" with stipulation.

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Attorney General, etc., Complainant,

vs.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD Co., Defendant.

49 List of documentary evidence to be introduced in rebuttal in the above-entitled cause on behalf the complainant.

First. Letter from the Hon. Commissioner of the General Land Office to the Hon. Secretary of the Interior, dated March 11th, 1882, deciding that the patent exhibited in the bill was improvidently granted, and recommending that suit be brought to cancel the same.

EXHIBIT "D" with stipulation.

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Attorney General, etc., Complainant,

vs.

THE KANSAS, LAWRENCE & SOUTHERN KANSAS RAILROAD Co., Defendant.

List of documentary evidence to be introduced in rebuttal in the above-entitled cause on behalf of the defendant.

1. Letter of Hon. Carl Schurz, Secretary of the Interior, addressed to Hon. D. C. Haskell, dated May 15th, 1878, concerning lands in controversy in this suit.

2. Letter of J. A. Williamson, Commissioner of Land Office, to Hon. Carl Schurz, dated May 2d, 1878, concerning lands in controversy.

G. W. McCRARY,
JAS. HAGERMAN,
Attorneys for Def't.

50*a* *Complainant's Proof, No-. 1 and 2, Exhibit "A."*

See Exhibit A with bill, page 11; Exhibit B with bill, page 15.

51*a* *Complainanant's Proof No. 3, Exhibit "A."*

See Exhibit "C" with bill, page 16.

52 *Complainant's Proof No. 4, Exhibit "A."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan'y* 17, '84.

Hon. J. R. Hallowell,
U. S. district attorney, Topeka, Kansas.

SIR: I am in receipt, by reference from the hon. Secretary of the Interior, of letter from the Department of Justice, dated the 21st ult., enclosing a copy of your communication of 13th ult., requesting certified copies of the following documents, to be used as evidence in the case of the United States *v.* The Kansas City, Lawrence & Southern Kansas R. R. Co., to wit:

1. A copy of the diagram of probable route of the L., L. & G. R. R., transmitted by the Commissioner of the General Land Office to the register & receiver at Humboldt, Kansas, in a letter of May 5, 1863; also a copy of said letter withdrawing lands under act of March 3, 1863 (12 Stat., 772).

2. A copy of the diagram of the same railroad transmitted by the Commissioner to the district office at Humboldt, May 10, 1867; also copy of letter accompanying said diagram.

3. A copy of diagram of M., K. & T. R'y, sent by Commissioner to the district office at Humboldt, Ap'l 3, '67, under act of July 26, 1866 (14 Stat., 289); also copy of the letter accompanying the diagram.

4. A copy of any diagram showing location of any line of railroad by the A., T. & S. F. R. R. "down the Neosho Valley to the point where the L., L. & Galveston R. R. enters said valley"—act of Congress M'ch 3, 1863 (12 Stat., 772); also copy of any order
53 or letter withdrawing lands for said Neosho Valley Branch.
If no diagram of the A., T. & Santa Fe was ever filed, or withdrawal made of it, then a certificate to that effect.

5. A copy of the certificate of the Governor of Kansas, dated Sept. 21, '71, showing which part of the L., L. & G. R. R. had been constructed.

6. A copy of the order or decision of the Commissioner, dated Oct. 8, '74, sent to the district officers at Independence, Kansas, and holding that the L., L. & G. R. R. has forfeited all right to indemnity lands.

7. A copy of the selection made Aug. 8, '72, by the M., K. & T. R'y and L., L. & G. R. R., jointly, as lands claimed under act of March 3, 1863, the same being certified the same date, viz., Aug. 8, '72, by the register & receiver at Humboldt, Kansas.

8. A copy of the assignment from L., L. & G. R. R. to M., K. & T. R'y, dated Dec. 17, '72, relinquishing all right to certain lands jointly selected as indemnity lands.

9. A copy of assignment by A., T. & S. F. R. R. to M., K. & T. R'y

Complainants Proof No 3 Exhibit "A" CSB

(4—207.)

Department of the Interior,

GENERAL LAND OFFICE,

Washington, D. C. January 17, 1884

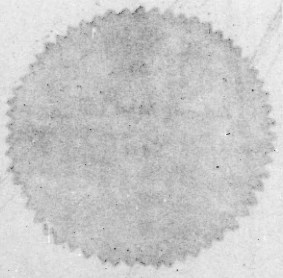
I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed diagram of the Missouri, Kansas and Texas Railway from Emporia to the South line of the State of Kansas, and the limits of the withdrawal for said Company under the act of Congress approved July 26, 1866, ordered by office letter dated March 19, 1867, also the limits of [illegible] to the Leavenworth, Lawrence and Galveston R.R.C., is a [illegible] and literal exemplification of the original diagram [illegible] that part to which it refers, now on file in this office.

[illegible] testimony whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

N. C. McFarland

Commissioner of General Land Office.

(13157—1,000.)



of the former's land grant under act of March 3, 1863, for the Neosho Valley Branch, dated M'ch 19, 1866, and ratified by Kansas Legislature Feb'y 26, 1867.

10. A certificate showing whether the M., K. & T. R'y received patents for the full amount of its grants from Junction City to northern boundary of Osage ceded lands. Have certificate show number of miles constructed and number of acres patented.

11. A copy of the letter or order of certification made Ap'l 19, '73, by the Commissioner to the State of Kansas of the lands embraced in the foregoing joint selection for the benefit of the M., K. & T. R'y Co.

54 12. A copy of the map filed Dec'r 2, '66, by the Union Pacific, S. Branch, R. R., required by sec. 4 of act of July 26, 1866.

In reply I have to state that in compliance with your request I enclose herewith certified copies of the documents described in items Nos. 1, 2, 3, 6, 7, 8, 9, 11, & 12 of your letter.

As to the documents described in item No. 4, the records of this office do not show that the A., T. & S. F. R. R. Co. ever filed a diagram of any line of railroad located "down the Neosho Valley to the point where the L., L. & G. railroad enters said valley;" hence there was no withdrawal except as given above, as per items No-. 1, 2, & 3.

As to the certificate of the Governor of Kansas of Sept. 21, '71, described in item No. 5, the records of this office show that a map of constructed road from Lawrence to the south boundary of Kansas ($142\frac{8}{0}$ miles), sworn and subscribed by the chief engineer and certified by the Governor Sept. 21, '71, was received at this office Dec'r 14th, with a letter from the Secretary of the Interior, dated Dec. 13, '71.

I have caused a thorough search to be made, but up to the present time said map, which has been mislaid, has not been found; therefore I am unable to furnish you with the Governor's certificate, which is attached to the map.

As to item No. 10, this office cannot certify as to whether the M., K. & T. R'y Co. has received patents for the full amount of its grant from Junction City to the northern boundary of the Osage ceded lands; neither can it certify to the number of miles of the road constructed, nor the number of acres patented to it, but you can be furnished with a certified copy of the map of the constructed road, and exemplified copies of the patented lists, should you desire them.

55 You will observe that the dates of the letters directing the withdrawal of lands, copies of which are herewith enclosed, do not agree with dates given in your letter, but as the dates given by you correspond with the dates of the receipt of the respective letters at the local offices it was inferred that you desired the copies of the letters described in my certificate.

Very respectfully,

N. C. McFARLAND,
Commissioner.

Endorsed: No. 4118. Filed Dec. 20, 1884. A. S. Thomas, clerk.

56 *Complainant's Proof No.* 5, *Exhibit "A."*

STATE OF KANSAS,
OFFICE OF SECRETARY OF STATE.

I, James Smith, secretary of State of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original instrument of writing filed in my office September 21, 1871.

In testimony whereof I have her unto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 21st day of Nov., 1884.

[SEAL.] JAMES SMITH,
Secretary of State.

57 STATE OF KANSAS, EXECUTIVE OFFICE,
TOPEKA, *Sept.*, 1871.

I, James M. Harvey, Governor of the State of Kansas, do hereby certify that this map or plat of the railroad of the Leavenworth, Lawrence and Galveston Railroad Company has been duly filed in my office by the said Leavenworth, Lawrence and Galveston Railroad Company, and shows that portion of said railroad commencing at Lawrence, Kansas, and ending at the south line of the State of Kansas, in the direction of Galveston Bay, in Texas, which has been completed and equipped as required by the act of Congress approved March 3rd, 1863, and the act of the Legislative Assembly of the State of Kansas approved February 9th, 1864, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in construction of certain railroads and telegraphs in said State, and to apply the same to the construction of said roads and telegraphs," granting lands to the said railroad company.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of State of Kansas.

Done at the State capitol this 21st day of September, 1871.

[GREAT SEAL.] JAMES M. HARVEY, *Governor.*

Attest: W. H. SMALLWOOD,
Secretary of State.

Endorsed: No. 4118. Filed Dec. 20, 1884. A. S. Thomas, clerk.

58 *Complainant's Proof No* 6, *Exhibit "A."*

Defendant's Proof No. 17, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter dated October 8, 1874, addressed to the register and receiver at Independence, Kansas, advising them that the Leavenworth, Lawrence and Gal-

veston R. R. Co. had failed to file proof of the completion of its road, & that a forfeiture results, is a true and literal exemplification of the original, as shown by the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

59 *Letter of General Land Office, October* 8, 1874.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 8, 1874.

Register and receiver, Independence, Kansas:

GENTLEMEN: I am in receipt of your letters, dated April 22, 1873, and February 25, 1874, transmitting lists of lands selected by the Missouri River, Fort Scott & Gulf Railroad Company as lands inuring to the grant for said company made by the act of Congress approved July 25, 1866.

These lands are odd sections within the indemnity limits of said grants.

The lands in question are also within the indemnity limits of the grant made for the State of Kansas for the Leavenworth, Lawrence & Galveston Railroad Company by act of Congress approved March 3, 1863.

By the provisions of this act the right of the last-named company attached to the lands within the limits of the grant, upon the definite location of the road, which was from Lawrence to the north boundary of the Osage Indian lands, November 15, 1866.

The lands in dispute are opposite this portion of the road.

The lands in both the granted and indemnity limits were withdrawn by order of the Secretary of the Interior.

This order took effect May 10, 1867.

In the fourth section of the act making the grant, which restricts the power of disposal to ten miles until the whole road is completed, it is provided "that if any part of said road and branches is
60 not completed within ten years from the passage of this act, no further sale shall be made, and the lands unsold shall revert to the United States."

This provision of the act certainly indicates that the company was to be allowed ten years in which to comply with the terms of said act. It would seem to follow that the lands must have been held reserved for the benefit of the company during that time.

Section one (1) of the act of Congress, approved July 25, 1866, making a grant of lands to the State of Kansas for the benefit of the Missouri river, Fort Scott & Gulf Railroad Company, provides that the right of the company shall attach to the lands within the limits of the grant at the date of the definite location of the road. This was February 11, 1868. It also provided in the first section of the act "that any and all lands heretofore reserved to the United

States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purposes whatever, be, and the same are hereby, reserved and accepted from the operation of this act," etc., etc.

The question to be decided is, "Were these lands so reserved?"

It is considered by this office that they were so reserved by the act of Congress, and by competent authority, for the purpose of aiding in the construction of a railroad from Leavenworth by the way of Lawrence, to the southern boundary of Kansas.

This reservation was in effect at the date of the definite location of the railroad, February 11, 1868, and continued in effect for the purpose of the grant until the expiration of the period allowed by the statute.

61 The claim of the Missouri River, Fort Scott & Gulf Railroad Company to select the lands in question must therefore be rejected, and your action to that effect is approved.

In this connection the question arises: "Are these lands subject to selection by the Leavenworth, Lawrence & Galveston Railroad Company as lands inuring to the grant for the benefit of said company?"

The act making the grant provides that if any portion of the road is not completed within ten years from the passage of the act no further sale of lands shall be made, and the lands unsold shall revert to the United States. The ten years expired March 3, 1873.

The act provides that the road shall be constructed from the city of Leavenworth, by the way of the town of Lawrence, to the southern line of the State, in the direction of Galveston Bay, in Texas. There is on file in this office a map of constructed road from Lawrence to the southern boundary of the State of Kansas. This map is certified by the Governor of Kansas, according to law, under date of September 21, 1871. There is no evidence on file in this office that the road has been constructed from Leavenworth to Lawrence, as required by the act of Congress, and the time having expired, it must be considered that by the failure of the company to comply with the terms of the law, a forfeiture results of its claim to the lands within the indemnity limits of the grant, and said lands have reverted to the United States.

This office will therefore recommend to the Secretary of the Interior that the lands within the indemnity limits, to which no valid claim exists, be restored to entry as a part of the public domain.

You will notify both companies of this action, and allow sixty days for appeal.

Very respectfully,

S. S. BURDETT,
Commissioner.

62 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a list of lands selected August 8th, 1872, by the Missouri, Kansas and Texas Railway Com-

pany and the Leavenworth, Lawrence and Galveston Railroad Company, jointly, under the acts of Congress approved March 3, 1863, and July 26, 1866, is a true and literal exemplification of the original now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Commissioner of General Land Office.

63 *Complainant's Proof No.* 7, *Exhibit "A."*

Defendant's Proof No. 10, *Exhibit B.*

List of lands selected August 8, 1872, by the M., K. & T R'l'y Co., and the L., L. & G. R'l'y Co.

STATE OF KANSAS, U. S. LAND OFFICE,
INDEPENDENCE, *August* 8, 1872.

The Missouri, Kansas & Texas Railway Company (formerly the Union Pacific railway, Southern Branch), and the Leavenworth, Lawrence and Galveston Railway Company, under and by virtue of the act of Congress entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," approved 3d March, 1863, as to both of said companies, and "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas to Fort Smith, Arkansas," approved 26th July, 1866, as to the Missouri, Kansas & Texas Railway Company, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of public lands claimed by said companies as a portion of the lands within the indemnity limits common to both roads, inuring to them, and to which they are entitled under and by virtue of the grants and provisions of the said acts of Congress, and the location of the lines of routes of the roads of the said companies, being for that portion of the road of the Missouri, Kansas & Texas Railway Company commencing at the north line of (N. W. ¼) northwest quarter of section five (5), township twenty-three (23) south, of range sixteen (16) east, and ending at the south line of lot one of section twenty-nine (29), township twenty-six (26) south, of range eighteen (18); and for that portion of the road of the Leavenworth, Lawrence & Galveston railroad commencing at the north line of the northwest quarter of section six, township twenty-three (23) south, of range nineteen (19) east, and ending at the south line of lot three, section twenty-seven, township twenty-six south, of range eighteen (18) east, the selections being particularlarly described as follows, to wit:

(Here follows description of lands, including those in controversy; total acreage being 24,345.99.)

64

Part of section.	Sec.	Town.	Range.	No. of acres.	
S w ¼	27	24	15	160	
W ½ of s e ¼	"	"	"	80	
N e ¼	33	"	"	160	
E ½ of n w ¼	"	"	"	80	
E ½ of s w ¼	"	"	"	80	
S e ¼	"	"	"	160	
S w ¼	35	"	"	160	
W ½ of s e ¼	"	"	"	80	
W ½ of s w ¼	1	25	"	80	
S e ¼ of "	"	"	"	40	
[S ½ of n e ¼	3	"	"	80]	Hd. 445, July 28, 1863. Can. Nov. 24, 1866.
N e ¼ of s e ¼	5	"	"	40	
[S e ¼ " "	"	"	"	40]	Entered May 16, 1867.
W ½ of n e ¼	9	"	"	80	
[N w ¼	"	"	"	160]	Entered Dec. 4, 1864.
[W ½ of n e ¼	11	"	"	80]	Offered filing 3255 July 24, '66.
N w ¼ w ½ n w	"	"	"	80	E ½ filing 3255 July 24, '66.
N w ¼ of s e ¼	"	"	"	40	
E ½ " "	"	"	"	80	
N w ¼	15	"	"	160	
N e ¼ of n e ¼	23	"	"	40	
W ½ n w ¼ n e ¼	"	"	"	40	S w ¼ n e ¼, off. filing No. 3233 July 7, 1866.
N w ¼ s w ¼ n w ¼	"	"	"	40	E ½ & n w n w off. filing No. 3233 July 7, '66.
S w ¼	"	"	"	160	
W ½ of s e ¼	"	"	"	80	
W ½ of n e ¼	25	"	"	80	
65 [N e ¼ of n e ¼	29	25	15	40]	Entered Mar. 18, 1862.
N w ¼ " "	"	"	"	40	
S ½ of n e ¼	"	"	"	80	
E ½ of s w ¼	"	"	"	80	
[N w ¼	33	"	"	160	Offered filing No. 3303 Aug. 31, 1866.
E ½ of s w ¼	"	"	"	80	
S e ¼	"	"	"	160	
N ½ of n w ¼	1	26	"	80	
[S e ¼	"	"	"	160	Entered Dec. 2, 1857.
N w ¼ of s e ¼	3	"	"	40	
E ½ " "	"	"	"	80	
N e ¼	5	"	"	160	
E ½ of n w ¼	"	"	"	80	
E ½ of s w ¼	"	"	"	80	
S e ¼	"	"	"	160	
N e ¼	9	"	"	160	Offered filing No. 3296 Aug. 17, 1866.
[N w ¼	"	"	"	160]	Entered Dec., 1864.
S w ¼ e ½ s w ¼	"	"	"	80	W ½ of s w ¼, offered filing 3282 Aug. 6, 1866.
S e ¼	"	"	"	160	
N e ¼	15	"	"	160	
N w ¼	"	"	"	160	
S w ¼	"	"	"	160	
S e ¼	"	"	"	160	
E ½ of n e ¼	17	"	"	80	
N w ¼ "	"	"	"	40	
N e ¼ of n w ¼	"	"	"	40	
[E ½ of s w ¼	17	26	15	80]	H'd 717, June 7, '65; canc. Nov. 24, '66.

Part of section.	Sec.	Town.	Range.	No. of acres.	
N e ¼	21	"	"	160	
N w ¼	"	"	"	160	
S w ¼	"	"	"	160	
S e ¼	"	"	"	160	
S ½ of n e ¼	23	"	"	80	
66 S e ¼	"	"	"	160	
Lot 1	25	"	"	29.41	
Lot 2	"	"	"	29.17	
Lot 3	"	"	"	28.91	
Lot 1	27	"	"	30.10	
Lot 2	"	"	"	30.30	
Lot 3	"	"	"	30.50	
Lot 4	"	"	"	30.70	
Lot 1	29	"	"	30.86	
Lot 2	"	"	"	30.44	
Lot 3	"	"	"	30.62	
N w ¼	19	25	16	158.88	
S w ¼	"	"	"	157.82	
N w ¼	31	"	"	159.37	
S w ¼	"	"	"	159.79	
S e ¼	"	"	"	160	
[N e ¼	7	26	"	160]	H'd 3153 made under filing 3333, Nov. 1, 66.
N w ¼	"	"	"	149.65	
N e ¼ of n w ¼	19	"	"	40.00	
W ½ " "	"	"	"	70.19	
N w ¼ of s w ¼	"	"	"	35.20	
S ½ of s e ¼	"	"	"	80	
Lot 2	29	"	"	29.69	

[NOTE.—Words in brackets are erased in copy.]

67 Part of Section.	Sec.	Town.	Range.	No. of acres.
Lot 3	29	26	16	29.53
Lot 4	"	"	"	29.38
S e ¼ of n w ¼	13	24	20	40
W ½ of s e ¼	"	"	"	80
S e ¼ of n e ¼	27	"	"	40
E ½ of s e ¼	"	"	"	80
N e ¼	35	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	1	25	"	159.71
S e ¼	"	"	"	160
N e ¼	3	"	"	159.03
N w ¼	"	"	"	158.93
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	13	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160

	Part of Section.	Sec.	Town.	Range.	No. of acres.
	N e ¼	15	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	E ½ of n e ¼	17	"	"	80
	E ½ of s e ¼	"	"	"	80
68	N e ¼	21	25	20	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	23	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	25	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	27	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	29	"	"	160
	E ½ of n w ¼	"	"	"	80
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	S e ¼ of n e ¼	31	"	"	40
	E ½ of s e ¼	"	"	"	80
	N e ¼	33	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N w ¼	35	25	20	160
	S w ¼	"	"	"	160
	N w ¼ of s e ¼	"	"	"	40
69	E ½ " "	"	"	"	80
	N e ¼	1	26	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	3	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	W ½ of s e ¼	"	"	"	80
	N e ¼ " "	"	"	"	40
	N e ¼	5	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160

Part of Section.	Sec.	Town.	Range.	No. of acres.
E ½ of n e ¼	7	"	"	80
E ½ of s e ¼	"	"	"	80
N e ¼	9	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	11	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	11	26	20	160
N e ¼	13	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	15	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	17	"	"	160
70 N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
E ½ of n e ¼	19	"	"	80
E ½ of s e ¼	"	"	"	80
N e ¼	21	"	"	160
S ¼ of s w ¼	"	"	"	40
E ½ of s w ¼	"	"	"	80
S e ¼	"	"	"	160
N e ¼	23	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
Lot 1	25	"	"	41.25
Lot 2	"	"	"	45.84
Lot 1	27	"	"	49.84
Lot 2	"	"	"	48.88
Lot 1	29	"	"	53.66
Lot 2	"	"	"	55.22
S w ¼	19	25	21	154.05
S e ¼	"	"	"	160
N w ¼	29	"	"	160
S w ¼	"	"	"	160
N e ¼	31	"	"	160
N w ¼	"	"	"	157.85
S w ¼	"	"	"	159.30
S e ¼	"	"	"	160
N w ¼	5	26	"	160
S w ¼	"	"	"	160
N e ¼	7	"	"	160

	Part of Section.	Sec.	Town.	Range.	No. of acres.
71	N w ¼	"	"	"	148.25
	S w ¼	"	"	"	148.30
	S e ¼	"	"	"	160
	W ½ of n e ¼	17	"	"	80
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	W ½ of s e ¼	"	"	"	80
	N e ¼	19	"	"	160
	N w ¼	"	"	"	149.85
	S w ¼	"	"	"	150.11
	S e ¼	"	"	"	160
	Lot 1	29	"	"	31.62
	Lot 2	"	"	"	33.84
					24,345.99

72 STATE OF KANSAS, *County of* ——:

I, N. S. Goss, being duly sworn, depose and say that I am land acting commissioner and the land agent of the Missouri, Kansas & Texas Railway Company, formerly the Union Pacific railway, Southern Branch; and I, John W. Scott, being duly sworn, depose and say that I am land commissioner and the land agent of the Leavenworth, Lawrence & Galveston Railroad Company; that the foregoing list of lands which we hereby jointly selected is a correct list of a portion of the public lands claimed by the said Missouri, Kansas & Texas Railway Company and the said Leavenworth, Lawrence & Galveston Railroad Company as inuring to them to aid in the construction of the railroads from Fort Riley, Kansas, to Fort Smith, Arkansas, and from the city of Leavenworth by way of the city of Lawrence to the southern line of the State in the direction of Galveston Bay, Texas, for which a grant of land was made by the acts of Congress approved 3d March, 1863, and 26th July, 1866; that said lands are vacant, unappropriated, and are not interdicted mineral, nor reserved land, and are of the character contemplated by the grant, being within the limits of twenty miles of each side of the lines of the routes, for a continuous distance of twenty-three miles, of the Missouri, Kansas & Texas railway, and of twenty-two miles of the Leavenworth, Lawrence & Galveston railroad, being for that portion of each road starting from the north line of N. W. quarter of section five, township twenty-three south, of range sixteen (16) east, as to the Missouri, Kansas & Texas railway, and from the north line of northwest quarter of section six, township twenty-three south, of range nineteen east, as to the Leavenworth, Lawrence &
73 Galveston railroad, and ending as to the first-named road at the south line of lot one of section twenty-nine, township twenty-six south, of range eighteen east, and as to the last-named road, at the south line of lot three, of section twenty-seven, township twenty-six south, of range eighteen east, the said lands being in the indemnity limits of both said railroads, and the same are

only partial selections of the lands claimed by the said railroad companies, the right being reserved to make other and further joint selections of such lands within their joint limits as may be found after investigation to inure to them.

JNO. W. SCOTT,
Land Commissioner of L., L. & G. R. R. Co.
N. S. GOSS,
Acting Land Commissioner M., K. & T. R'l'y Co.

Subscribed and sworn to before me this 8th day of August, A. D. 1872.

P. B. MAXSON, *Register.*

I, P. B. Maxson, register of the land office at Independence, Kansas, do hereby certify that the above affidavit was taken and subscribed before me this 8th day of August, 1872.

P. B. MAXSON, *Register.*

UNITED STATES LAND OFFICE,
INDEPENDENCE, KANSAS, *August* 8, 1872.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Missouri, Kansas & Texas Railway Company, (formerly the Union Pacific Railway, Southern Branch,) and by the Leavenworth, Lawrence & Galveston Railroad Company, under the grants to the State of Kansas by acts of Congress approved 3d March, 1863, as to both of said roads, and by act of Congress approved 26th July, 1866, as to the Missouri,
74 Kansas & Texas Railway Company, and selected jointly by Isaac T. Goodnow, the duly authorized agent of the Missouri, Kansas & Texas Railway Company, and by John W. Scott, the duly authorized agent of the Leavenworth, Lawrence & Galveston Railroad Company, and we have tested the accuracy of the said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of twenty miles on each side of said roads, and that the same are not nor in any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by circular of instructions, dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices, and that the said companies have paid to the undersigned, the receiver, the full sum of $304 in full payment and discharge of said fees.

P. B. MAXSON, *Register.*
M. W. REYNOLDS, *Receiver.*

Upon the above was the following endorsement:

6—1147

Indemnity.

INDEPENDENCE, KANSAS.

Received, with register's letter, September 4, 1872, transmitting returns for August, '72. (Sup'd certification.)

Missouri, Kansas & Texas, and Leavenworth, Lawrence & Galveston R. R'ds, conflicting indemnity limits.

Posted December 5, 1872.

SPOFFORD.

75 *Complainant's Proof No.* 8, *Exhibit "A."*

Defendant's Proof No. 11, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a list of lands, with the relinquishment of the Leavenworth, Lawrence and Galveston Railroad Company, dated December 13th, 1872, attached is a true and literal exemplification of the original list and relinquishment now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

76 *Independence Dist., List* 3.

Part of Sec.	Sec.	Town.	Range.	No. of Acres.
S w ¼	27	24	15	160
W ½ of s e ¼	"	"	"	80
N e ¼	33	"	"	160
E ½ of n w ¼	"	"	"	80
E ½ of s w ¼	"	"	"	80
S e ¼	"	"	"	160
S w ¼	35	"	"	160
W ½ of s e ¼	"	"	"	80
W ½ of s w ¼	1	25	"	80
S e ¼ of s w ¼	"	"	"	40
N e ¼ of s e ¼	5	"	"	40
W ½ of n e ¼	9	"	"	40
W ½ of n w ¼	11	"	"	80
N w ¼ of s e ¼	"	"	"	40
E ½ of s e ¼	"	"	"	80
N w ¼	15	"	"	160
N e ¼ of n e ¼	23	"	"	40
N w ¼ of n e ¼	"	"	"	40
S w ¼ of n w ¼	"	"	"	40
S w ¼	"	"	"	160

	Part of Sec.	Sec.	Town.	Range.	No. of Acres.
	W ½ of s e ¼	"	"	"	80
	W ½ of n e ¼	25	25	15	80
	N w ¼ of n e ¼	29	"	"	40
	S ½ of n e ¼	"	"	"	80
77	E ½ of s w ¼	"	"	"	80
	E ½ of s w ¼	33	"	"	80
	S e ¼	"	"	"	106
	N ½ of n w ¼	1	26	"	80
	N w ¼ of s e ¼	3	"	"	40
	E ½ " "	"	"	"	80
	N e ¼	5	"	"	160
	E ½ of s w ¼	"	"	"	80
	S e ¼	"	"	"	160
	E ½ of s w ¼	9	"	"	80
	S e ¼	"	"	"	160
	N e ¼	15	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	E ½ of n e ¼	17	"	"	80
	N w ¼ of n e ¼	"	"	"	40
	N e ¼ of n w ¼	"	"	"	40
	N e ¼	21	26	15	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	S ½ of n e ¼	23	"	"	80
	S e ¼	"	"	"	160
	Lot 1	25	"	"	29.41
	Lot 2	"	"	"	29.17
78	Lot 3	"	"	"	28.91
	Lot 1	27	"	"	30.10
	Lot 2	"	"	"	30.30
	Lot 3	"	"	"	30.50
	Lot 4	"	"	"	30.70
	Lot 1	29	"	"	30.86
	Lot 2	"	"	"	30.44
	Lot 3	"	"	"	30.62
	N w ¼	19	25	16	158.88
	S w ¼	"	"	"	157.82
	N w ¼	31	"	"	159.37
	S w ¼	"	"	"	159.79
	S e ¼	"	"	"	160
	N w ¼	7	26	16	149.65
	N e ¼ of n w ¼	19	"	"	40
	W ½ " "	"	"	"	70.19
	N w ¼ of s w ¼	"	"	"	35.20
	S ½ of s e ¼	"	"	"	80
	Lot 2	29	"	"	29.69

	Part of Sec.	Sec.	Town.	Range.	No. of Acres.
	Lot 3	"	"	"	29.53
	Lot 4	"	"	"	29.38
	S e ¼ of n w ¼	13	24	20	40
	W ½ of s e	"	"	"	80
	S e ¼ of n e	27	"	"	40
	E ½ of s e ¼	"	"	"	80
	N e ¼	35	"	"	160
79	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	1	25	20	159.71
	S e ¼	"	"	"	160
	N e ¼	3	"	"	159.03
	N w ¼	"	"	"	158.93
	S w ¼	"	"	"	160
	S e ¼	3	25	20	160
	N e ¼	13	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	15	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	E ½ of n e ¼	17	"	"	80
	E ½ of s e ¼	"	"	"	80
	N e ¼	"	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	23	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
80	S e ¼	"	"	"	160
	N e ¼	25	"	"	160
	N w ¼	"	"	"	160
	S w ¼	25	25	20	160
	S e ¼	"	"	"	160
	N e ¼	27	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	29	"	"	160
	E ½ of n w ¼	"	"	"	80
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	S e ¼ of n e ¼	31	"	"	40
	E ½ of s e ¼	"	"	"	80
	N e ¼	33	"	"	160

Part of Sec.	Sec.	Town.	Range.	No. of Acres.
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N w ¼	35	"	"	160
S w ¼	"	"	"	160
N w ¼ of s e ¼	"	"	"	40
E ½ of s e ¼	"	"	"	80
E ½	1	26	20	160
N w ¼	1	26	20	160
S w ¼	"	"	"	160
81 S e ¼	"	"	"	160
N e ¼	3	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
W ½ of s e ¼	"	"	"	80
N e ¼ of s e ¼	"	"	"	40
N e ¼	5	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
E ½ of n e ¼	7	"	"	80
E ½ of s e ¼	"	"	"	80
N e ¼	9	"	"	160
N w ¼	9	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	11	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	11	26	20	160
N e ¼	13	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	15	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
82 S e ¼	"	"	"	160
N e ¼	17	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
E ½ of n e ¼	19	"	"	80
E ½ of s e ¼	"	"	"	80
N e ¼	21	"	"	160
S w ¼ of s w ¼	"	"	"	40
E ½ of s w ¼	"	"	"	80
S e ¼	"	"	"	160
N e ¼	23	"	"	160

	Part of Sec.	Sec.	Town.	Range.	No. of Acres.
	N w ¼	23	"	"	160
	S w ¼	23	26	20	160
	S e ¼	"	"	"	160
	Lot 1	25	"	"	41.25
	Lot 2	"	"	"	45.84
	Lot 1	27	"	"	49.84
	Lot 2	"	"	"	48.88
	Lot 1	29	"	"	53.66
	Lot 2	"	"	"	55.22
	S w ¼	19	25	21	154.05
	S e ¼	"	"	"	160
	N w ¼	29	"	"	160
	S w ¼	"	"	"	160
	N e ¼	31	"	"	160
	N w ¼	"	"	"	157.85
83	S w ¼	"	"	"	159.30
	S e ¼	"	"	"	160
	N w ¼	5	20	21	160
	S w ¼	"	"	"	160
	N e ¼	7	"	"	160
	N w ¼	"	"	"	148.20
	S w ¼	"	"	"	148.30
	S e ¼	7	20	21	160
	W ½ of n e ¼	17	"	"	80
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	W ½ of s e ¼	"	"	"	80
	N e ¼	19	"	"	160
	N w ¼	"	"	"	149.85
	S w ¼	19	"	"	150.11
	S e ¼	"	"	"	160
	Lot 1	29	"	"	31.62
	Lot 2	"	"	"	33.84
					24,345.99

84 For the purpose of partition, the Leavenworth, Lawrence and Galveston R. R. Company, by the hand of its president and over the seal of the company, hereby relinquish all their right, title, and interest in and to the afore-described lands (embraced in Independence joint indemnity list No. 3) to the Missouri, Kansas & Texas Railway Company, their successors and assigns, and request that patents therefor may issue to said Missouri, Kansas & Texas Railway Company.

In witness whereof the Leavenworth, Lawrence & Galveston R. R. Co. have as aforesaid signed and sealed, at Chicago, in the State of Illinois, this thirteenth day of December, A. D. 1872.

[SEAL.] J. M. WALKER, *President.*

Endorsed: No. 4118. Filed Dec. 20, 1884. A. S. Thomas, clerk.

85 *Complainant's Proof No. 9, Exhibit "A."*

Defendant's Proof No. 2, Exhibit "B."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the assignment made March 19, 1866, by the Atchison, Topeka and Santa Fe R. R. Company to the Union Pacific Railway Company, Southern Branch (now known as the M., K. and T. R'y Co.), of the former's land grant, under the act of March 3, 1863, for the Neosho Valley Branch, is a true and literal exemplification of the certified copy of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

86 *Assignment by A., T. & S. F. R'l'd Co. to U. P. R'l'y Co., Southern Branch.*

This indenture, made this 19th day of March, A. D. 1866, by and between the Atchison, Topeka & Santa Fé Railroad Company, party of the first part, and the Union Pacific Railway Company, Southern Branch, party of the second part, both corporations created and organized under and by virtue of the laws of the State of Kansas:

Witnesseth: That whereas by act of Congress entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," approved March 3, 1863, lands were granted to said State in aid of the construction (among other roads and branches) of a railroad from where the main line of road of the party of the first part crosses the Neosho river, down said river to where the Leavenworth, Lawrence & Fort Gibson railroad enters said Neosho Valley; and whereas by the act of Congress entitled "An act making an additional grant of land to the State of Kansas to aid in the construction of railroad and telegraph lines," approved July the 1st, 1864, an additional grant of lands was made to the State of Kansas to aid the construction of a railroad and telegraph line from Emporia via Council Grove to a point near Fort Riley on the branch Union Pacific railroad in said State; and whereas the Legislature of the State of Kansas, by its act entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same in the construction of such railroads and telegraphs," approved February 9th, 1864, did accept the grant of lands so made by Congress; and whereas the Legislature of said State by said act did agree to grant, bargain, and sell to the party of the first part hereto, in consideration (among other things) that said

party of the first part should construct a railway from a point on the Union Pacific railroad, Eastern Division, at or near Fort Riley, down the Neosho river to the point where the Leavenworth, Lawrence and Fort Gibson railroad enters the said Neosho Valley, said road to be constructed as in said act of the Legislature and the above recited acts of Congress specifically provided;
87 and did agree, on the completion of sections of said road as therein provided, to convey by patent to the party of the first part hereto all the lands granted as aforesaid by Congress, and applicable to the construction of the road last above mentioned; and whereas the party of the first part did, within six months after the passage of the above-recited act of the Legislature of the State of Kansas, file their acceptance of the provisions of the above-recited act, and did thereby covenant and agree with the State of Kansas (among other things) *covenant* that they would construct the road herein indicated, and do and perform all and singular the conditions and requirements in said acts of said Legislature and of Congress contained; and whereas the party of the second part has since that time become a body corporate and politic, created and organized for the purpose of constructing a railroad from a point on the Union Pacific railroad, Eastern Division, on or near Fort Riley, to the southern boundary of the State of Kansas, by way of the Neosho Valley, and on the route of road contemplated in said acts of Congress and said Legislature; and whereas the Legislature of the State of Kansas has made to the said party of the second part a large appropriation to aid in the construction of the line of road last above mentioned; and whereas the great length of the main line of road of the party of the first part must delay the speedy construction of the road in the vally of the Neosho river; and whereas the public good requires that there should be no conflict of rights in the construction of the road in said valley: Therefore, for and in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in further consideration of the premises, covenants, undertakings, and agreements of the
88 party of the second part hereinafter contained and set forth, to be by said party kept, performed, and observed, the party of the first part hath bargained, sold, and assigned, and by these presents doth bargain, sell, and assign and transfer, set and deliver over, to the party of the second part, their representatives and assigns, all the rights, titles, and interests, franchises, authority, privileges, immunities, and liabilities held, acquired, possessed, and enjoyed for constructing, maintaining, operating, and enjoying a railroad from the Union Pacific railroad, Eastern Division, from a point at or near Fort Riley down the Neosho Valley to where the Leavenworth, Lawrence and Fort Gibson railroad may enter the Neosho Valley, which rights, titles, interests, franchises, authorities, immunities, and liberties accrued to and became vested in the parties of the first part by virtue of its acceptance of the provisions of the act of the Legislature of the State of Kansas above recited, and its promise, covenant, undertaking, and agreement to do and perform all and singular the requirements and conditions of said act of said Legislature and

the acts of Congress hereinbefore recited and referred to; and in compliance by the party of the second part with the terms, requirements, and conditions of the above-recited acts the party of the first part authorize and empower the party of the second part to receive, hold, and enjoy any lands, property, or effects applicable to the construction of a railroad between the points aforesaid as fully and completely as the party of the first part might have held and enjoyed such lands, property, and effects had this assignment or transfer never been made.

89 In consideration of the premises, and the further consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the party of the second part, their legal representatives and assigns, further agree, covenant, and promise with and to the party of the first part, their successors, legal representatives, and assigns, that they will and faithfully do and perform all and singular the duties, obligations, and requirements imposed upon said party of the first part, and assumed and undertaken by said party under the several acts of Congress and of the State of Kansas heretofore cited and hereby referred to as more fully setting forth the obligations and liabilities hereby assumed, and that they will construct, maintain, and operate a railroad and telegraph from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley down the Neosho River Valley to where the Leavenworth, Lawrence and Fort Gibson railroad may enter said valley, within the time required and on the terms and conditions prescribed in said acts; and the party of the second part further agree, covenant, and promise the party of the first part that they will protect and hold free from harm or loss in property or estate the party of the first part against all forfeitures or penalties incurred or adjudged against said last-named party in consequence of any default or failure made or permitted after the date hereof in the construction, maintenance, or operation of said road or telegraph embraced in this agreement; and the said party of the second part further agree that they will repay any and all moneys necessarily expended up to the date of these presents for engineer's survey, plat, and profiles by the party of the first part upon the above-named line of railroad on the delivery to them of said engineer's maps, plats, and profiles upon which such expenditures were made.

90 In testimony whereof the parties hereunto have subscribed their names and affixed their seals by order of the respective board of directors.

On behalf of the Atchison, Topeka & Santa Fé Railroad Company—

SAMUEL C. POMEROY, *President.* [SEAL.]
WILLIS GAYLORD, *Secretary.* [SEAL.]

In behalf — the Union Pacific railway, Southern Branch—

R. McBRATNEY, [L. S.]
N. S. GOSS, [L. S.]
Agents and Attorneys.

(The latter company has no seal.)

I, R. A. Barker, secretary of State, do hereby certify that the foregoing is a true and correct copy of the original on file in this office.

In testimony whereof I have subscribed my name and affixed the great seal of the State this 15th day of January, A. D. 1867.

[SEAL.] R. A. BARKER,
Secretary of State.

Act of Legislature Ratifying Assignment.

Chapter CII.—Railroads.

Resolution ratifying the transfer of certain railroad lands.

Resolved by the legislature of the State of Kansas—

That the transfer and assignment of the Atchison, Topeka
91 & Santa Fé Railroad Company, made and executed on the 19th day of March, A. D. 1866, to the Union Pacific Railway Company, Southern Branch, of all the rights, title, interest, authority, privileges, immunities, and liberties held, acquired, possessed, and enjoyed for constructing, maintaining, operating, and enjoying a railroad from a point on the Union Pacific railroad, Eastern Division, at or near Fort Riley down the Neosho Valley to where the Leavenworth, Lawrence & Fort Gibson railroad may intersect the Neosho Valley, be, and the same is hereby, ratified and confirmed: Provided, The term franchise, as used in the said transfer and assignment, shall not be construed to impair in any way the charter of said Atchison, Topeka & Santa Fé Railroad Company.

Approved, February 26, 1867.

S. J. CRAWFORD, *Governor.*

92 (4–207.)

Complainant's Proof No. 10, *Exhibit "A."*

Defendant's Proof No. 9, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 21st*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a map showing the line of the road of the Missouri, Kansas and Texas Railroad Company from Junction City to the southern boundary of the State of Kansas, with the affidavits attached, also the letter of the Secretary of the Interior, dated July 25th, 1870, transmitting the same, are true and literal exemplifications of the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

N. C. McFARLAND,
Commissioner of General Land Office.

92*a* DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *July 25th*, 1870.

SIR: I transmit herewith for filing a map showing the completed portion of the line of the road of the Missouri, Kansas and Texas Railroad Company from Junction City to the southern boundary of the State of Kansas, attached to which is a certificate of the Governor of said State, that that portion of the said road had been constructed and equipped as required by the acts of Congress granting lands to aid in its construction.

Very respectfully, your ob't servant,

J. D. COX, *Secretary.*

The Com'r of the General Land Office.

92*b* STATE OF KANSAS, } ss:
County of Davis, }

O. B. Gunn, of Junction City, in said county and State, being duly sworn, deposeth and says that he is the chief engineer of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas & Texas Railway Co., and has been such engineer since Nov. 1, 1869; that the line on this map, commencing at Junction City, at or near the centre of section twelve (12), in township twelve (12) south, of range five (5) east, and terminating at the southern line of the State of Kansas, at a point three thousand five hundred and ten (3,510) feet east of the twenty-seventh (27th) mile post or mound and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile post or mound on said southern line of the State of Kansas, shows the line of the route of said road in connection with the lines of the public surveys; that the road between those points has been completed and equipped as required by law.

O. B. GUNN,
Chief Engineer.

Sworn and subscribed this 9th day of July, 1870, before me—

[SEAL.] THOMAS HOOKEY,
Notary Public.

92*c* It is hereby certified that O. B. Gunn is the chief engineer of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas & Texas Railway Co., and that the location of the road as represented on this map is correct and approved by the company, and also that the said portion of the said road has been completed and equipped in all respects as required by law.

LEVI PARSONS, *President.*

Attest: H. B. HENSON, *Secretary.*

EXECUTIVE OFFICE,
TOPEKA, KANSAS, *July* 13, 1870.

I, James M. Harvey, Governor of the State of Kansas, do hereby certify that this map and profile of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas & Texas Railway Co., has been filed in my office by the said railway company, and shows that portion of the said railroad commencing at Junction City, at or near the centre of section 12, town. 12
92*d* south, range 5 east, and ending — southern line of the State of Kansas at *a* — thousand five hundred and ten (3,510) feet east of the 27th mile post, and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile post on said southern line of the State of Kansas, which has been completed and equipped as required by the acts of Congress granting lands to the State and to the said railroad company, approved March 3d, 1863, July 1st, 1864, and July 26th, 1866, and the act of the Legislative Assembly of the State of Kansas approved February 9th, 1864, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs."

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State.

Done at Topeka this thirteenth day of July, 1870.

[SEAL.] JAMES M. HARVEY, *Governor.*

Attest: THOMAS MOONLIGHT,
Secretary of State.

(Here follows diagram marked p. 92.)

93 *Complainant's Proof No.* 11, *Exhibit "A."*

Defendant's Proof No. 12, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of approved list, No. 8, of lands approved April 10, 1873, and certified to the State of Kansas, April 12, 1873, for the benefit of the Missouri, Kansas and Texas Railway Company, under the act of Congress approved March 3d, 1863, is a true and literal exemplification of that portion of the original approved list to which it relates on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

94 *List of Lands and Certificate of Commissioner of General Land Office.*

Missouri, Kansas and Texas railroad—Kansas.

List of lands in the district of lands subject to sale at Topeka and Independence, within the twenty-mile limits, granted to the State of Kansas by the act of Congress approved the 3d of March, 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," designated by odd numbers for ten sections in width on each side of said railroad, which the United States had not sold or to which the right of pre-emption or homestead had not attached.

95 *South of Base Line and East of 6th Principal Meridian, Kansas, Missouri, Kansas & Texas Railroad List.*

20-mile limits. Topeka district.

Independence District. Twenty-mile limits.

Parts of Section.	Sec.	T'wn.	R'ge.	Acres.
S w ¼	27	24	15	160
W ½ s e ¼	"	"	"	80
N e ¼	33	"	"	160
E ½ n w ¼	"	"	"	80
E ½ s w ½	"	"	"	80
S e ¼	"	"	"	160
S w ¼	35	"	"	160
W ½ s e ¼	"	"	"	80
W ½ s w ¼	1	25	15	80
S e ¼ s w ¼	"	"	"	40
N e ¼ s e ¼	5	"	"	40
W ½ n e ¼	9	"	"	80
W ½ n w ¼	11	"	"	80
N w ¼ s e ¼	"	"	"	40
E ½ s e ¼	"	"	"	80
N w ¼	15	"	"	160
N e ¼ n e ¼	23	"	"	40
N w ¼ n e ¼	"	"	"	40
S w ¼ n w ¼	"	"	"	40
S w ¼	"	"	"	160
W ½ s e ¼	"	"	"	80
W ½ n e ¼	25	"	"	80
96 N w ¼ n e ¼	29	"	"	40
S ½ n e ¼	"	"	"	80
E ¼ s w ¼	"	"	"	80
E ½ s w ¼	33	25	15	80
S e ¼	"	"	"	160
N ½ n w ¼	1	26	15	80
N w ¼ s e ¼	3	"	"	40
E ½ s e ¼	"	"	"	80
N e ¼	5	"	"	160

	Parts of Section.	Sec.	T'wn.	R'ge.	Acres.
	E ½ n w ¼	5	26	15	80
	E ½ s w ¼	"	"	"	80
	S e ¼	"	"	"	160
	E ½ s w ¼	9	"	"	80
	S e ¼	"	"	"	160
	N e ¼	15	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	E ½ n e ¼	17	"	"	80
	N w ¼ n e ¼	"	"	"	40
	N e ¼ n w ¼	"	"	"	40
	N e ¼	21	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	S ½ n e ¼	23	"	"	80
	S e ¼	"	"	"	160
97	Lot No. 1	25	"	"	29.41
	" " 2	"	"	"	29.17
	Lot No. 3	"	"	"	28.91
	" " 1	27	"	"	30.10
	" " 2	"	"	"	30.30
	" " 3	"	"	"	30.50
	" " 4	"	"	"	30.70
	" " 1	29	"	"	30.86
	" " 2	"	"	"	30.44
	" " 3	"	"	"	30.62
	N w ¼	19	25	16	158.88
	S w ¼	"	"	"	157.82
	N w ¼	31	"	"	159.37
	S w ¼	"	"	"	159.79
	S e ¼	"	"	"	160
	N w ¼	7	26	16	149.65
	N e ¼ n w ¼	19	"	"	40
	W ½ n w ½	"	"	"	70.19
	N w ¼ s w ¼	"	"	"	35.20
	S ½ s e ¼	"	"	"	80
	Lot No. 2	29	26	16	29.69
	" " 3	"	"	"	29.53
	" " 4	"	"	"	29.38
	S e ¼ n w ¼	13	24	20	40
	W ½ s e ¼	"	"	"	80
	S e ¼ n e ¼	27	"	"	40
98	E ½ s e ¼	"	"	"	80
	N e ¼	35	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160

	Parts of Section.	Sec.	T'wn.	R'ge.	Acres.
	N e ¼	1	25	20	159.71
	S e ¼	"	"	"	160
	N e ¼	3	"	"	159.03
	N w ¼	"	"	"	158.93
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	13	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	15	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	E ½ n e ¼	17	"	"	80
	E ½ s e ¼	"	"	"	80
	N e ¼	21	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	23	"	"	160
99	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	"	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	25	25	20	160
	N e ¼	27	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N e ¼	29	"	"	160
	E ½ n w ¼	"	"	"	80
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	S e ¼ n e ¼	31	"	"	40
	E ½ s e ¼	"	"	"	80
	N e ¼	33	"	"	160
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	S e ¼	"	"	"	160
	N w ¼	35	"	"	160
	S w ¼	"	"	"	160
	N w ¼ s e ¼	"	"	"	40
	E ½ s e ¼	"	"	"	80
	N e ¼	1	26	20	160
	N w ¼	"	"	"	160
100	S w ¼	"	"	"	160
	S e ¼	"	"	"	160

Parts of Section.	Sec.	T'wn.	R'ge.	Acres.
N e ¼	3	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
W ½ s e ¼	"	"	"	80
N e ¼ s e ¼	"	"	"	40
N e ¼	5	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
E ½ n e ¼	7	"	"	80
E ½ s e ¼	"	"	"	80
N e ¼	9	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	11	26	20	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	13	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	15	"	"	160
N w ¼	"	"	"	160
101 S w ¼	"	"	"	160
S e ¼	"	"	"	160
N e ¼	17	"	"	160
N w ¼	"	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
E ½ n e ¼	19	"	"	80
E ½ s e ¼	"	"	"	80
N e ¼	21	"	"	160
S w ¼ s w ¼	"	"	"	40
E ½ s w ¼	"	"	"	80
S e ¼	"	"	"	160
N e ¼	23	"	"	160
N w ¼	"	"	"	160
S w ¼	"	"	"	160
S e ¼	"	"	"	160
Lot No. 1	25	"	"	41.25
" " 2	"	"	"	45.84
Lot No. 1	27	26	20	49.84
" " 2	"	"	"	48.88
Lot No. 1	29	"	"	53.66
" " 2	"	"	"	55.22
S w ¼	19	25	21	154.05
S e ¼	"	"	"	160

	Parts of Section.	Sec.	T'wn.	R'ge.	Acres.
	N w ¼	29	"	"	160
	S w ¼	"	"	"	160
102	N e ¼	31	"	"	160
	N w ¼	31	"	"	157.85
	S w ¼	31	25	21	159.30
	S e ¼	"	"	"	160
	N w ¼	5	26	21	160
	S w ¼	"	"	"	160
	N e ¼	7	"	"	160
	N w ¼	"	"	"	148.20
	S w ¼	"	"	"	148.30
	S e ¼	"	"	"	160
	W ½ n e ¼	17	"	"	80
	N w ¼	"	"	"	160
	S w ¼	"	"	"	160
	W ½ s e ¼	"	"	"	80
	N e ¼	19	"	"	160
	N w ¼	"	"	"	149.85
	S w ¼	"	"	"	150.11
	S e ¼	"	"	"	160
	Lot No. 1	29	"	"	31.62
	" " 2	"	"	"	33.84
					24,345.99

Recapitulation.

	Acres.
Topeka district	3,386.51
Independence district	24,345.99
Total	27,732.50

103 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 7, 1873.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to seven, inclusive, is a correct and true list of the tracts of land within the twenty-mile limits granted to the State of Kansas by the act of Congress approved March 3, 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," being the vacant and unappropriated lands in the alternate sections, designated by odd numbers, for ten sections in width on each side of the Missouri, Kansas and Texas Railroad in Kansas.

And it is further shown by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25, 1870, and map therewith, duly certified by the Governor of the State of Kansas, that the said Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of Kansas.

And they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of the said act of March 3, 1863, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first hereinabove written.

[SEAL.] WILLIS DRUMMOND, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April* 10, 1873.

Approved, subject to the conditions above mentioned.

C. DELANO, *Secretary.*

(4–207.)

104 *Complainant's Proof No.* 12, *Exhibit "A."*

Defendant's Proof No. 3, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 17, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed diagram of the definite location of the line of the road of the Union Pacific Railway Company, Southern Branch, from Fort Riley to the north boundary of the Osage Indian lands, filed with the Secretary of the Interior December 3, 1866, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

N. C. McFARLAND,
Commissioner of General Land Office.

(Here follows diagram marked p. 104.)

105 *Defendant's Proof No.* 1, *Exhibit "B."*

STATE OF KANSAS,
OFFICE OF SECRETARY OF STATE.

I, James Smith, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original instrument of writing filed in my office August 4, 1864.

In testimony whereof I have hereunto subscribed my name and affixed my official seal. Done at Topeko, Kansas, this 3rd day of July, 1884.

[SEAL.] JAMES SMITH,
By W. T. CAVANAUGH,
Ass't Sec'y of State.

106 *Acceptance of Land- Grant Act of March* 3, 1863, *and of Act of Legislature of Kansas of February* 9, 1864. (*Filed with Secretary of State of Kansas August* 4, 1864.)

Hon. W. W. H. Lawrence, secretary of state for Kansas, Topeka, Kansas.

SIR: At a meeting of the board of directors of the Atchison, Topeka & Santa Fé Railroad Company, held at the office of the State treasurer, in the city of Topeka, on the 16th day of February, 1864, a quorum being present, the following resolution was adopted, in accordance with the provisions of the 4th section of the act of the Kansas Legislature, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such roads and telegraphs," approved February 9, 1864, to wit:

Resolved, That the Atchison, Topeka & Santa Fé Railroad Company hereby accepts the provisions of an act of the Legislature of the State of Kansas, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such roads and telegraphs," approved February 9, 1864.

Now, therefore, I, Samuel C. Pomeroy, president of the Atchison, Topeka & Santa Fé Railroad Company, do hereby certify that the foregoing resolution of acceptance was duly proposed and adopted at the meeting of the board of directors of said Atchison, Topeka & Santa Fé Railroad Company, as specially narrated at the beginning of this instrument.

In testimony whereof I hereunto subscribe my name and cause the seal of our said railroad company to be impressed, at the city of New York, on this the twenty-first day of July, A. D. 1864.

[SEAL.] S. C. POMEROY,
President of the Board of Directors of the Atchison, Topeka & Santa Fé Railroad Company.

Attest: C. K. HOLLIDAY,
Secretary and Director of the Atchison, Topeka & Santa Fé Railroad Company.

107 *Defendant's Proof No.* 2, *Exhibit "B."*

See complainant's proof No. 9, Exhibit "A," page 85.

108 *Defendant's Proof No.* 3, *Exhibit "B."*

See complainant's proof No. 12, Exhibit 'A," page 104.

109 *Defendant's Proof No.* 4, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Feb.* 6, 1884.

I, H. M. Teller, Secretary of the Interior, hereby certify that the paper hereto attached is a true copy of the original now on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department to be affixed the day and year first above written.

[SEAL.] H. M. TELLER, *Secretary.*

110 *Letter of Goss and Cox of Jan. 3, 1867, in Relation to Map of Definite Location, Certified to by Secretary of Interior.*

WASHINGTON, D. C., *January* 3, 1867.

Hon. O. H. Browning, Secretary of the Interior.

SIR: The map of the definite location of the line of the Union Pacific railway, Southern Branch, from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage lands, was forwarded to you 17th Nov., 1866, from Topeka by the Governor of Kansas, and received at your office November the 26th, 1866, but, for some unaccountable reason, without a letter of transmittal. Hon. R. McBratney's attention having been called to the fact, filed a letter of transmittal under date of 26 November, 1866, which contains errors and omissions which the company desire to correct.

We therefore respectfully request that this letter be placed on file, as declaratory of the purposes for which the said company presented and filed said map.

The map was filed to show the line of said road as definitely located by said company from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage reservation. An additional map will be filed as soon as the surveys of the line are completed from said northern boundary of the Osage Indian reservation to the southern boundary to the State of Kansas.

In presenting the map heretofore filed as above stated the company do not wish to be regarded as precluded by such location of the line from making any reasonable changes hereafter when the road is being constructed which further examination of the route
111 shall dictate as expedient, nor as being subject, by reason of such changes, to a loss of any part of the lands granted.

We desire further to say that we claim on behalf of said company all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka & Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants, and that we also claim all the lands granted to the State of Kansas for the Union Pacific Railway (Southern Branch) Company by the act of Congress approved 26 July, 1866.

In behalf of said Union Pacific Railway (Southern Branch) Company, we therefore respectfully request that the lands granted by said acts between Junction City and the northern boundary of the said Osage Indian reservation, within the limits prescribed in said acts, from the line of the road as designated in said plat be reserved from sale until the lands of said company be selected.

Very respectfully, your obedient servants,

N. S. GOSS, *President and Att'y,*
JOHN T. COX, *Agent and Att'y,*
U. P. R. W., S. B., Co.

WASHINGTON, D. C., *January* 3, 1867.

Union Pacific, S. Branch, N. S. Goss, President:

In relation to the filing of the map showing the definite location of the Union Pacific Railway (Southern Branch) Company from Junction City, near Fort Riley, Kansas, to the northern boundary of the Osage lands.

Answered January 7, 1867.

(L., G. R. R., vol. 1, 140.)

Engineer office, Jan. 5, 1867, Department of Interior.

112 *Defendant's Proof No.* 5, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Feb.* 6, 1884.

I, H. M. Teller, Secretary of the Interior, hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department to be affixed the day and year first above written.

[SEAL.] H. M. TELLER, *Secretary.*

113 *Defendant's Proof No.* 5, *Exhibit "B."*

Letter of O. H. Browning, Secretary of Interior, January 7, 1867.

Certified to by Secretary of Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C. *January* 7, 1867.

SIR: I have received the joint letter of yourself and J. T. Cox, Esq., dated the 3d instant, requesting that it be placed on file as declaratory of the purposes for which the Union Pacific Railway (Southern Branch) Company presented and filed a map of the definite location of the line of said road from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage lands.

You state that you "claim on behalf of said company all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka & Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants," and also all the lands granted to the State of Kansas for the Union Pacific Railway (Southern Branch) Company by the act of Congres approved July 26, 1866.

While this Department doubt not the rights of the Union Pacific Railway (Southern Branch) Company under the latter act, it cannot recognize said company as entitled to the benefits of the acts of Congress approved March 3d, 1863, and July 1st, 1864, until it shall have established by due proofs a title to all the rights and interest vested under said acts in the Atchison, Topeka & Santa Fé Railroad Company.

The map, however, will be filed and appropriate action taken in regard to it under the act of Congress approved July 26, 1866.

I am, sir, very respectfully, your obedient servant,

O. H. BROWNING, *Secretary.*

N. S. Goss, Esq., president Union Pacific Railway, S. B., Co., care Jno. T. Cox, Esq., Senate P. O., Washington, D. C.

114 *Defendant's Proof No.* 6, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 6th*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter dated January 31st, 1867, and addressed to Hon. Secretary of the Interior by N. S. Goss, president and attorney, and J. T. Cox, agent and attorney of the Union Pacific Railway Company, Southern Branch, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

115 *Letter of Goss and Cox, of January* 31, 1867, *in Regard to Assignment Certified to by Commissioner of General Land Office.*

WASHINGTON, D. C. *January* 31, 1867.

Hon. O. H. Browning, Secretary of the Interior:

SIR: We have the honor to acknowledge the receipt of yours of the 7th instant, in which you state that—

"While this Department doubt not the rights of the Union Pacific Railway (Southern Branch) Company, under the latter acts (referring to the act of Congress approved July 26, 1866), it cannot recognize said company as entitled to the benefits of the acts of Congress approved March 3, 1863, and July 1, 1864, until it shall have established by due proofs a title to all the rights and interests vested under said acts in the Atchison, Topeka & Santa Fé Railroad Company."

In compliance with your request we herewith transmit a certified copy of the transfer and assignment from the Atchison, Topeka & Santa Fé Railroad Company to the Union Pacific Railway (Southern Branch) Company of all the rights and interests vested in the Neosho Valley Branch of said railroad company under the acts of Congress approved March 3, 1863, and July 1, 1864, and of the act of the Legislature of the State of Kansas, approved February 9, 1864, accepting said grants.

We would therefore respectfully ask that it be placed on file and accepted as the proof required.

Yours truly, &c.,

N. S. GOSS,
President and Attorney.
JOHN T. COX,
Agent and Attorney Union Pacific Railway (Southern Branch) Company.

116 *Defendant's Proof No. 7, Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January*, 17, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter, dated March 19, 1867, addressed to the register and receiver at Humboldt, Kansas, and directing them to withhold from entry and sale, for the benefit of the grant of July 26, 1866, certain lands in the limits of said grant in their district, is a true and literal exemplification of the original letter as shown by the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

117 *Defendant's Proof No. 7, Exhibit "B."*

Letter of General Land Office of March 19, 1867, certified to by Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 19, 1867.

Register and receiver, Humboldt, Kansas.

GENTLEMEN: Under act of Congress approved July 26, 1866, Pamph. Laws 1866, there is granted to Kansas to aid in the construction of a railroad by the "Union Pacific Railrod Company, Southern Branch," from "Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the State," every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile, and where any of said sections have been reserved, sold, pre-empted, or otherwise disposed of by the United States, then there is to be reserved "for the purposes aforesaid," from the public lands of the United States "nearest to the lands above specified so much of said land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated," etc., provided "that said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

The 2d section of the act increases the price of the even sections within ten miles on each side of said road to double the minimum price, provided that actual *bona fide* settlers under the pre-emption laws may, upon due proof, etc., purchase the same at the price fixed for said land at the date of settlement, and provided that homestead settlers may take 80 acres each of such double minimum lands.

The 4th section requires that the lands granted shall be withdrawn as soon as the company shall file a map of its line of route.

The company having duly filed a line of route in this office, through the Secretary of the Interior, I enclose a diagram of that part coming within the limits of your district, with the ten and twenty mile limits on each side of the road, laid down thereon. You will, upon its receipt, proceed to mark on your plats the limits as thereon designated, and will reserve from sale, location, or entry of any kind, except in case of *bona fide* pre-emption initiated prior to withdrawal, all the odd-numbered sections within the ten-mile limits, and all the vacant lands between the ten and twenty mile limits.

The even sections within the ten-mile or granted limits you will withdraw from private entry, and the same will only be subject to pre-emption and homestead entry at the rate of $2.50 per acre until
regularly offered at public sale, except in cases of *bona*
118 *fide* pre-emptions, where settlement was made prior to this
withdrawal, wherein the party may make proof and pay for the same at $1.25 per acre.

Be pleased to acknowledge the receipt of this, from which time the same becomes effective.

Very respectfully, JOS. S. WILSON,
Commissioner.

(In the foregoing letter was enclosed diagram of M., K. & T. R'ly from Emporia to the south line of the State of Kansas, and the limits of withdrawal of said company under the act of Congress approved July 26, 1866. For particulars reference is made to said map.) See Complainant's Proof No. 3, Exhibit "A," page 51.

119 *Defendant's Proof No.* 8, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 6th*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of the Hon. O. H. Browning, Secretary of the Interior, dated March 25th, 1867, directing a withdrawal of lands for the benefit of the Union Pacific Railway Company, Southern Branch, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

120 *Decision of Secretary of Interior.*

Decision of the Secretary of the Interior directing withdrawal of land for U. P. R'l'y Co., S. B., certified to by the Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 25, 1867.

SIR: Under date of the 19th ultimo I sent to you a map of the Union Pacific railway, Southern Branch, showing the route of said road in Kansas from Junction city down the Neosho Valley to the northern boundary of the Osage lands.

A grant of land was made to the State of Kansas to aid in the construction of this road July 26, 1866. (Stat. 1866, page 289.)

By acts of Congress approved March 3d, 1863, and July 1, 1864, grants of land were made to the said State to aid in the construction of certain other railroads. By said act of 1863 one of these roads and its branch, the Atchison, Topeka & Santa Fé railroad, is from Atchison, via Topeka and (as amended by act of 1864) Emporia, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, and the branch, from where the main line crosses the Neosho (at Emporia), down the Neosho Valley to where the road from Leavenworth and Lawrence enters said valley.

The said act of 1864 is for a railroad from Emporia to Junction City.

The ground from Emporia southwardly is covered by the grants of 1863 and 1866, and from that point northwardly by the grants of 1864 and 1866.

N. S. Goss, Esq., president of the said Union Pacific Railway Company, Southern Branch, claims on behalf of said company "all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3d, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka & Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9th, 1864, accepting said grants," as well as the lands granted by the said act of July 26, 1866. A certified copy of that assignment, also a certified copy of resolution No. 6 of the Legislature of Kansas, approved February 26, 1867, ratifying the same, have been filed by Mr. Goss.

The grant of the State of Kansas by the said acts of 1863 and 1864 is the alternate odd-numbered sections for ten sections in width on each side of the roads and branches, with the right of indemnity for lands disposed of from odd sections outside of ten and within twenty miles of the same, provided, "that any and all lands heretofore re-

121 served to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act," except when it is found necessary to locate the routes through such reserved lands; in that case the right of way is granted subject to the approval of the President of the United States.

The lands thus granted are subject to the disposal of the Legislature for the purpose of aiding in the construction of the railroads exclusively, "and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act provided," which is that the State may sell 120 sections before any road is built, and thereafter 120 sections upon the completion of every twenty miles, "provided that if any part of said roads and branches is not completed within ten years from the passage of this act no further sale shall be made, and the lands unsold shall revert to the United States."

The grant to Kansas by said act of July 26, 1866, is for alternate odd-numbered sections to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile, with right of indemnity outside of ten and within twenty miles from both the odd and even sections, provided that any and all lands reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever are reserved and excepted from the act, except the right of way of 200 feet in width through such reserved lands, subject to the approval of the President of the United States.

122 This grant of lands is declared to be made upon the condition that said company, after its construction, shall keep it in repair and use, and shall at all times transport United States troops, supplies, and public stores free from all cost or charge therefor to the Government, and the granted lands are to inure to the benefit of said company upon the Governor of Kansas certifying to the completion of any section of ten consecutive miles of road, the lands within the limits of such completed section and co-terminous with the same are to be patented to the company. Upon said company filing with the Secretary of the Interior maps of its line designating the route thereof it is made his duty to withdraw from market the lands granted in such manner as to effect the purpose of the act and subserve the public interest. The right of way through the public lands is granted to said company, its successors and assigns, to the extent of 200 feet where the same may pass through the public domain; also all necessary ground for station-houses, work-shops, &c., with the right to take from the public lands adjacent to the line of said road material for the construction thereof.

The acceptance by said company of the terms and conditions of the grant, duly executed, has been filed.

The said railroad company is also authorized to extend and construct its railroad from the southern boundary of Kansas through the Indian Territory, upon certain conditions.

The State of Kansas will, upon complying with the terms, conditions, and stipulations of said acts of March 3, 1863, and July 1, 1864, become entitled to the lands granted by said acts. To enable the State to do so the land may be withdrawn for that purpose, and you will issue the necessary instructions to the land officers

123 of Kansas, if such instructions have not already been issued.

In virtue of said assignment and the ratification thereof by

the Legislature of the State of Kansas, the lands inuring to the State under said grants of 1863 and 1864 will be adjusted to the State for the benefit of said Union Pacific Railway (Southern Branch) Company upon the principles heretofore established and now in force, and then, if any lands remain to the United States of odd sections within the limits of twenty miles on each side of the railroad between the termini mentioned, the said Union Pacific Railway (Southern Branch) Company will become entitled to patents for such odd sections, and also for such even sections as remain to the United States outside the ten and within twenty miles of the road, upon complying with all the terms, conditions and stipulations of said act of July 26, 1866.

If the even sections of land remaining to the United States outside of the ten and within the twenty miles have not been withdrawn, you will issue the necessary instructions to the land officers in Kansas withdrawing the same.

The map of definite location of the route of said railroad, now on file in your office, will become the basis of adjustment of the grants under said acts.

The certified copies of assignment and act of the Legislature referred to are herewith to be placed on the files of your office.

You will send a copy of this letter to the Governor of Kansas.

Very respectfully, your obedient servant,

O. H. BROWNING, *Secretary.*

Hon. Jos. S. Wilson, Comm'r of the Gen'l Land Office.

124 *Defendant's Proof No.* 9, *Exhibit "B."*

See complainant's proof No. 10, Exhibit "A," page 92.

Defendant's Proof No. 10, *Exhibit "B."*

See complainant's proof No. 7, Exhibit "A," page 63.

Defendant's Proof No. 11, *Exhibit "B."*

See complainant's proof No. 8, Exhibit "A," page 75.

Defendant's Proof No. 12, *Exhibit "B."*

See complainant's proof No. 11, Exhibit "A," page 93.

125 *Defendant's Proof No* 13, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 21st*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter dated April 12th, 1873, and addressed to Hon. Thos. A. Osborn, Governor of Kansas, is a true and literal exemplification of the original, as shown by the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

126 *Letter from the Land Office to the Governor of Kansas Forwarding Certified List.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 12, 1873.

Hon. Thos. A. Osborn, Governor of Kansas, Topeka, Kansas:

SIR: Herewith I have the honor to transmit exemplified copy of approved list No. 5, embracing 3,386.51 acres, selected in the Topeka district, and 24,345.99 acres, in the Independence district; total, 27,732.50 acres, as lands inuring under the act of March 3, 1863, to the State of Kansas, for the benefit of "Missouri, Kansas & Texas Railroad Company."

The list was returned by you in conformity with our letter of 18th ulto., for correction in certificate, under the act of March 3, 1863, which has been properly made.

Please acknowledge its receipt.

I am, sir, very respectfully,

WILLIS DRUMMOND,
Commissioner.

127 [In pencil] 14 B, Ex. D with bill.
15 B, " E " "
16 B, " F " "

Defendant's Proof No. 14, *Exhibit* "*B.*"

See Exhibit "D" with bill, page 18.

Defendant's Proof No. 15, *Exhibit* "*B.*"

See Exhibit "E" with bill, page 20.

Defendant's Proof No. 16, *Exhibit* "*B.*"

See Exhibit "F" with bill, page 23.

128 *Defendant's Proof No.* 17, *Exhibit* "*B.*"

See complainant's proof No. 6, Exhibit "A," page 58.

129 *Defendant's Proof No.* 18, *Exhibit* "*B.*"

Letter from General Land Office to Britton & Gray, Oct. 29, 1884.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 29, 1884.

Messrs. Britton & Gray, attorneys for M., K. & T. R'l'y Co., Washington, D. C.

GENTLEMEN: In compliance with your letter of the 28th inst., you are advised that under the grant of July 25, 1866, there were issued to the Missouri, Kansas, & Texas Railway Company the following patents:

Granted Limits.

No. 6,	containing	43,794.75 acres,	Feb. 16, 1874.
No. 11,	"	1,087.05 "	Apr. 12, 1876.
No. 12,	"	871.38 "	Aug. 17, 1876.

45,753.18 acres.

Indemnity Limits.

No. 3,	containing	1,720.00 acres,	Apr. 11, 1872.
No. 4,	"	114,418.12 "	June 28, 1872.
No. 5,	"	81,218.30 "	Nov. 3, 1873.
No. 6,	"	39,027.54 "	Feb. 16, 1874.
No. 7,	"	80.00 "	June 15, 1874.
No. 8,	"	80.00 "	Jan. 23, 1875.
No. 9,	"	4,555.89 "	Mar. 19, 1875.
No. 10,	"	63,986.75 "	Jan. 5, 1876.
No. 11,	"	18,817.67 "	Apr. 12, 1876.
No. 12,	"	1,433.99 "	Apr. 12, 1876.
No. 13,	"	1,582.48 "	Apr. 23, 1877.

326,920.74 acres.

Osage Lands, Granted Limits.

No. 1,	containing	44,763.89 acres,	Feb. 19, 1872.
No. 2,	"	76,955.72 "	Feb. 26, 1872.

121,719.61 acres.

Indemnity Limits.

No. 1,	containing	83,079.67 acres,	Feb. 19, 1872.
No. 2,	"	28,835.98 "	Feb. 26, 1872.
No. 7,	"	16,444.80 "	June 5, 1874.

128,360.45 acres.

By decision of the Supreme Court of the United States, at its October term, 1875, in the case of the Missouri, Kansas, & Texas Railway Company *vs.* United States (2 Otto, 760), the title of the company to the Osage ceded lands embraced in patents numbers 1 and 2, and 1, 2, and 7, last described, was vacated.

Very respectfully,

D. HARRISON,
Acting Commissioner.

130 *Defendant's Proof No.* 19, *Exhibit "B."*

Letter from General Land Office to Britton & Gray, Nov. 1, 1884.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov.* 1, 1884.

Messrs. Britton & Gray, Washington, D. C.

GENTLEMEN: Referring to your letter of the 31st ult., I have to

advise you that lands have been certified to the State of Kansas for the benefit of the Missouri, Kansas & Texas Railway Company, under the act of March 3, 1863, and July 1, 1864, as follows:

Granted Limits.

List No. 1,	containing	52,390.21	acres,	Dec. 23, 1871.
No. 6,	"	26,016.94	"	June 19, 1872.
J't No. 1,	"	8,500.20	"	Sept. 25, 1872.
No. 8½,	"	17,890.44	"	May 31, 1873.
No. 9,	"	18,742.75	"	May 31, 1873.
J't No. 10,	"	7,399.72	"	Oct. 16, 1573.
J't No. 4,	"	618.70	"	Feb. 11, 1875.
No. 20,	"	600.00	"	Feb. 11, 1875.
J't No. 5,	"	160.00	"	July 17, 1875.
No. 22,	"	198.47	"	Dec. 22, 1875.
No. 28,	"	160.00	"	May 10, 1881.
No. 29,	"	200.00	"	May 10, 1881.
No. 30,	"	200.00	"	May 10, 1881.

133,077.43 acres.

131

Indemnity Limits.

List No. 2,	containing	39,629.21	acres,	Dec. 23, 1871.
No. 7,	"	40,532.43	"	June 19, 1871.
No. 8,	"	27,732.50	"	Apr. 10, 1873.
No. 8½,	"	52,537.72	"	May 31, 1873.
No. 9,	"	800.00	"	May 31, 1873.
No. 11,	"	43,617.18	"	Oct. 16, 1873.
No. 21,	"	671.43	"	Dec. 22, 1875.
No. 26,	"	200.00	"	Apr. 19, 1877.

205,720.47 acres.

Osage Ceded Lands—Granted Limits.

J't list No. 2,	containing	10,545.43	acres,	June 5, 1874.
J't No. 3,	"	1,324.64	"	July 23, 1874.

11,870.07 acres.

Indemnity Limits.

List No. 15,	containing	1,400.09	acres,	June 5, 1874.
No. 17,	"	7,620.56	"	July 23, 1874.

Total, 9,020.65 acres.

Recapitulation.

Granted limits	133,077.43 acres.
Indemnity limits	205,720.47 "
Osage ceded lands, granted limits	11,870.07 "
" " " indemnity "	9,020.65 "
Total	359,683.62 acres.

By decision of the Supreme Court of the United States, at its October term, 1875, in the case of the Missouri, Kansas & Texas Railway Company *vs.* United States (2 Otto, 760), the title of the company to the lands in the Osage ceded reservation, embraced in lists 15 and 17 and joint lists 2 and 3, was vacated.

Very respectfully,

J. D. SMITH,
Acting Commissioner.

132 *Defendant's Proof No.* 20, *Exhibit "B."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 6th*, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of this office of Sept. 15, 1870, on the question of the rights of the Missouri, Kansas and Texas Railway Company and the Leavenworth, Lawrence and Galveston Railroad Company to lands in Kansas under the act of March 3d, 1863, is a true and literal exemplification of the original decision on record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

N. C. McFARLAND,
Commissioner of General Land Office.

133 *Decision of General Land Office, September* 15, 1870.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Sept.* 15, 1870.

Messrs. T. A. & C. Ewing, attorneys Leavenworth, Lawrence & Galveston R. R. Co., Washington city.

GENTLEMEN: I have received and considered your argument in the matter of the conflicting claims of the Leavenworth, Lawrence and Galveston Railroad Company and the Union Pacific Railroad Company, Southern Branch, to certain lands in the granted and indemnity limits of said roads.

First, with reference to the lands north of the Osage ceded lands:

You argue that the Southern Branch road claims under the act of 26th July, 1866, for a railroad from Fort Riley to Fort Smith, and also as assigees of the Atchison, Topeka & Santa Fé Railroad Company, under the act of 3d March, 1863, for a railroad from the point where the Atchison, Topeka & Santa Fé railroad crosses the Neosho down said Neosho Valley to the point where the Leavenworth, Lawrence and Galveston road enters the said Neosho Valley; but that they cannot claim under both acts, as that would be a double grant, and that they have no right under said act of 1863, but are restricted to the act of July, 1866; that the grant to your
134 road under the act of 3d March, 1863, is three years prior to the grant of 1866 to the Southern Branch road, and hence

that said company have no claims as against the Leavenworth, Lawrence and Galveston Company to any of the lands in conflict north of the Osage Indian lands.

With the question of the right of the Southern Branch Company, as assignees of the Atchison, Topeka & Santa Fé Company, to the grant of lands under the act of 3d March, 1863, for the railroad from where the said Atchison, Topeka & Santa Fé road crosses the Neosho river to the point where the Leavenworth, Lawrence & Galveston road enters the Neosho Valley, we are not now competent to deal, matter having been determined, so far as concerns this office, by the decision of the Department of March, 1867, in which, after due deliberation, the Secretary fully recognizes the right of said company under that act, and indicates the principle upon which the grant shall be adjusted; nor does he in that decision recognize a double grant to said company, but states that, in virtue of the assignment to the Southern Branch road, the lands inuring to the State under the grant of 1863 and 1864 will be adjusted to the State for the benefit of the South Branch Company, and then, if any lands remain to the United States within the limit of twenty miles of the road, the South Branch Company will be entitled to patent for such odd sections and also such even sections as remain to the United States outside of the ten and within twenty miles of the road, &c.

By the specific terms of adjustment we are required to charge the grant of 1866 with all the lands on odd sections which may be found vacant and inuring under the grant of 1863, and then make up to it any deficiency out of the unappropriated odd or even
135 sections within the indemnity limits, the only advantage inuring to the company by the act of 1866 being the more liberal promise made for indemnity.

The question then left for determination is: What is the extent of the grant under the act of 3d March, 1863, for the branch line down the Neosho Valley?

This branch is, by the statute, to run from where the Atchison, Topeka & Santa Fé road crosses the Neosho river, "down said Neosho Valley to the point where the Leavenworth, Lawrence & Galveston road enters the said Neosho Valley."

The southern limit, then, of the grant is the point where the road represented by you enters the Neosho Valley; where now is that point? Your argument asserts that you might, "with a fair show of reason, insist that where the line of the Leavenworth, Lawrence & Galveston road crosses the summit (or, in Western phrase, 'the divide') between the Osage and the Neosho, it enters the valley of the Neosho, but you think the better interpretation is, that where the line first touches the level land bordering on the river, there is the point where it enters the Neosho Valley," and where the branch coming down the valley from Emporia must join it, and which is a point adjacent to the town of Iola.

To give to the indefinite terminus of the grant a definite location, it will be proper to ascertain the intent of Congress in making the grant, and the views of the State, as the grantee, in the acceptance.

Congress granted to the State land for—

1. A road running from Leavenworth via Lawrence southward through the State, in the direction of Galveston Bay, in Texas.

136 2. For a road from Atchison via Topeka to the western boundary of the State, with a branch from where it should cross the Neosho, down said Neosho Valley to where the first-named road enters the said Neosho Valley.

The purpose of Congress in these grants was to assist in the construction of one main stem running southwest from Atchison, one running from Leavenworth and Lawrence, and a branch line connecting the two; the point of union of the branch with the main stem from Atchison is definitely fixed at or near Emporia; that on the main stem from Lawrence is at the point where said road from Lawrence "enters the Neosho Valley;" the evident object of this branch line was to give to Western Kansas a short route to and from Southern Kansas and the South. And, with this object in view, the line of route was designated as running down the valley of the Neosho, as required by the act, to the north boundary of the Osage Indian lands. Now, to give to the expression "Neosho Valley" the broad interpretation advanced by you would be to require this branch to leave the Neosho river and seek your road for a junction at a point ten, fifteen, or perhaps twenty miles from the river, and upon a route that could be of little, if any, benefit to the State or its people, or else, while building its road down the Neosho Valley, to obtain a grant for only that part of the road north of a line due east and west from the point claimed by you as the point where your road enters the valley, and which would deprive said branch road of a grant for a large portion of its road, while Congress evidently intended that for each mile of road built the same quantity of land should be given as was granted to the other roads and branches provided for in the same act.

137 Further, by referring to the act granting lands to aid in the construction of the Kansas & Neosho Valley Road from the Union Pacific road, Eastern Division, southwardly through the eastern tier of counties in Kansas, with a view of its extension so as to effect a junction at Red river with a railroad then being constructed in Texas, and giving, in certain contingencies, the right of way through the Indian Territory, we find by the eleventh section of the act it is provided that after the railroad shall be located to the valley of the Neosho river, any other railroad company duly chartered might connect, unite, and consolidate with it upon equitable terms, &c.

We have here a similar expression as that used in the act of 1863, which has been given a definite interpretation by the Honorable Secretary of the Interior in his very able argument of the 21st of May last, to His Excellency the President, on the relative right of the Kansas & Neosho Valley, Leavenworth, Lawrence & Galveston, and the Union Pacific (South Branch) Railroad Companies to build a road through the Indian Territory.

The Secretary expresses clearly the opinion that the law requires the road which should first reach the boundary to do so at the point where the Neosho river crosses said boundary; and though the line

of the Kansas & Neosho Valley road strikes the boundary about ten miles east of the river crossing, and according to the interpretation given by you in your argument may, for all the purposes of the act, be in the valley of the Neosho, yet the Secretary finds that the point where the said Kansas & Neosho — Railroad Company has touched the southern boundary of Kansas and the northern boundary of the Indian Territory is not one reasonably within the meaning and purpose of the general scheme which "he has found to have
138 been fixed by the legislation and treaties referred to," and determine that the said road is not authorized at present, under said legislation, to enter the Indian Territory and build the trunk line aforesaid, and that, to complete its rights at this time, to do so it would have been necessary for said road to have been completely constructed to a point in the Neosho Valley at or near the crossing of the boundary line by the Neosho. These findings were approved by the President. Again, in the acceptance of the grants of 1863 by the State, under the legislative act of the 9th of February, 1864, it is declared "that at the point of intersection of said roads and branches there shall be an equal division of the lands granted to aid in building said roads and branches," thus recognizing the right of the branch to the grant at the point of intersection.

It is thus evident that in the use of the term "Neosho Valley" Congress and the State had in view the lowest portion of the valley, or that part nearest to the river available for railroad purposes, and that the point where the first-named road enters the Neosho Valley "is the point where it reaches or crosses the river, and that the grant of 1863 for the branch road would reach to this point." The point of crossing, however, is within the limits of the lands ceded under the first article of the Osage Indian treaty of September 29, 1865, and, as the act of 1863 evidently did not contemplate giving any lands within an Indian reservation, the grant to the Atchison branch, as well as the Leavenworth, Lawrence & Galveston road, under that act must stop at the boundary of said reserve, but to that point it is our opinion that the branch line is entitled to lands on equal terms with the Leavenworth, Lawrence & Galveston road.

139 Second, with regard to the lands ceded under the first article of the treaty, 29th September, 1865:

These lands are claimed by you as against the Southern Branch road by reason of prior grants, "it being held that no location of the branch line which could be made under the act of 1863 could give it any of the Osage ceded lands;" therefore, so far as the lands are concerned, the Southern Branch Company can claim only under the act of 26th July, 1866, while the Leavenworth, Lawrence & Galveston Company claims under the act of 3d March, 1863; that by the treaty these lands became public lands, and were such at the date of the filing of maps of definite location through said lands, so that by the terms of the law a grant inured to the road through it.

In support of your views you refer to the former Secretary's decision of 8th November, 1867, in which that officer quotes the opinion of Attorney General Black in the claim of Wisconsin to Stockbridge Indian lands under the Fox and Wisconsin River improvement grant,

and upon the option treats the lands now being considered as granted because the treaty made them public lands before the date of location of your road, and therefore regarded the Senate amendment as inserted "to recognize by express stipulation the binding efficacy of prior grants, and to exclude any possible conclusion adverse to the rights thereby conferred."

Your argument thus precludes the necessity for the amendment to the treaty, and applies without any such amendment, and by the mere force of the act of March 3, 1863, you acquire a right to these lands. If such is the effect of the statute then the Senate has done an entirely unnecessary act in proposing and having accepted
140 the amendment relative to railroad grants, and the same is a mere surplusage in the treaty.

Whilst the Secretary has referred in his letter to this opinion of the Attorney General, and noticed its bearing upon the present question, yet his decision is a recognition as well of the act of 1866, passed after the treaty but prior to its ratification, as of the act of 1863, made prior to the treaty.

When the matter of the right of the companies was first presented to the Department this office expressed the opinion that the treaty required the lands to be disposed of for the benefit of the Indians, and that the railroad company had no rights thereto, and the present Secretary, upon an application to modify the instructions issued under the joint resolutions of 10th April, 1869, for sale of these lands, expresses his doubts as to the rights of any railroad company to the lands, saying it is questionable whether anything more than a right of way over them passed. He adds, however, that "without dwelling upon this point, which seems to have been settled by my predecessor in favor of the companies, it cannot be doubted," &c.; thus considering the former decision as a recognition of the rights of both companies, which he is not now disposed to disturb.

We cannot, therefore, accept your interpretation of the laws, and whilst admitting your position that the branch road has no rights under the act of 1863 in the Osage ceded lands, we must also restrict the grant of the Leavenworth, Lawrence & Galveston road under said act to the same limit, and express the opinion that, without the recognition of the railroad grants by the treaty, no roads could have acquired any right whatever in these lands.

141 With this view we are bound, under the Department ruling, to recognize any grants existing at the date of final ratification of the treaty, where the route of the road runs through these ceded lands. These are the grant of the Leavenworth, Lawrence & Galveston Railroad Company, and the Union Pacific, Southern Branch, now Missouri, Kansas & Texas Railroad Company.

The Southern Branch Company having then acquired rights of equal date with the Leavenworth, Lawrence & Galveston road under the treaty amendments to the lands in the ceded tract, it is now our opinion that the same must be taken jointly where the limits of the two roads conflict or overlap.

This opinion is, of course, open to an appeal therefrom to the honorable Secretary of the Interior, and thirty days are allowed within which to file such appeal.

Very respectfully, JOS. S. WILSON,
Commissioner.

142 *Defendant's Proof No.* 21, *Exhibit "B."*

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 2*d Dec.*, 1884.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies, the first paper of the original on file in this Department, and the second of the record of this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.] WM. TELLER,
Secretary of the Interior.

143 *Acceptance of Act of July* 26, 1866, *by M., K. & T. R'l'y Co.*

To the Secretary of the Interior Department, Washington, D. C.

SIR: This is to certify that at a legally convened meeting of the directors of the Union Pacific Railway (Southern Branch) Company, the same being a corporation originally chartered under the laws of the State of Kansas, at Emporia, Lyon county, Kansas, on the 8th day of August, A. D. 1866, the following resolutions were adopted:

Resolved, That the terms, conditions, and impositions of a bill granting lands to the State of Kansas to aid in the construction of the Southern Branch of the Union Pacific railway and telegraph from Ft. Riley, Kansas, to Ft. Smith, Arkansas, passed by Congress 24th day of July, A. D. 1866, and approved by the President 26th day of July, A. D. 1866, be, and the same are hereby, accepted by the said Union Pacific Railway (Southern Branch) Company; and

Resolved, That a copy of this resolution, properly authenticated, be forwarded to the Secretary of the Interior.

Given under our hands and the corporate seal of the Union Pacific Railway (Southern Branch) Company, at Emporia, Lyon county, Kansas, this sixth (6th) day of December, A. D. 1866.

N. S. GROSS,
Pres. U. P. R'l'y (Southern Branch) Co.

[Seal Union Pacific Railway, Incorporated Sept. 25, 1865, Southern Branch.

P. B. MAXSON,
Sec. U. P. R'l'y (Southern Branch) Co.

Endorsed: "Union Pacific, Southern Branch. Emporia, Kans.," December 6, 1866. P. B. Maxson. Resolution of the board of directors of the U. P. R. R., S. B., accepting the act of Congress approved July 24, 1866. Ack. Jan'y 4, 1867.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Jan.*, 1867.

SIR: I have to acknowledge the receipt on the 26th ulto. of
144 a certified copy of a resolution of the directors of the Union Pacific Railway (Southern Branch) Company accepting "the terms, conditions, and impositions of a bill granting lands to the State of Kansas to aid in the construction of the Southern Branch of the Union Pacific railway and telegraph from Ft. Riley, Kansas, to Ft. Smith, Arkansas, passed by Congress 24th day of July, A. D. 1866, and approved by the President 26th day of July, 1866.

I am, sir, very respectfully, your obedient servant,

O. H. BROWNING, *Secretary.*

To P. B. Maxson, Esq., secretary of the Union Pacific Railway (S. B.) Co., Emporia Kansas.

145 *Defendant's Proof No.* 22, *Exhibit "B."*

Resolution changing name of U. P. (S. B.) R'l'y Co. to M., K. & T. R'l'y Co.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Levi Parsons, president of the Missouri, Kansas and Texas Railway Co. (late Union Pacific Railway Company, Southern Branch), being duly sworn, deposes and says:

That at a meeting of the stockholders of the said Union Pacific Railway Company, Southern Branch, held at Emporia, Kansas, on the third day of February, 1870, at which meeting a majority of the stock of said company was present, it was voted that the name of said Union Pacific Railway Company, Southern Branch, be changed, and made "Missouri, Kansas and Texas Railway Company."

LEVI PARSONS, *President.*

Subscribed and sworn to before me this 26th day of March, 1870.

WM. H. RUSSELL,
Commissioner for Kansas in the City, County, and State of New York.

I, Thomas Moonlight, secretary of state, State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument filed in my office March 31, A. D. 1870.

In testimony whereof I have hereunto subscribed my name and caused to be affixed the great seal of the State.

Done at Topeka, this 31st day of March, A. D. 1870.

[SEAL.] THOMAS MOONLIGHT,
Secretary of State, State of Kansas.

146 (Copy.)

Complainant's Proof (in Rebuttal) No. 1, Exhibit "C."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 11, 1882.

Hon. S. J. Kirkwood, Secretary of the Interior, Washington, D. C.

SIR: I have the honor to acknowledge the receipt, by reference, of a letter addressed to your predecessor by Hon. William Lawrence, dated August 31, 1880.

Mr. Lawrence, as attorney for settlers in Kansas, enclosed an argument to show that certain lands in that State had been erroneously patented to certain railroad companies, and requested your predecessor to advise the Attorney General to commence proceedings in the proper courts of the State of Kansas to reclaim to the United States the lands described by him, or permit him, as attorney for the settlers to do so, after first giving bond to the United States to indemnify them against costs.

This office was directed to make a recommendation in the premises, but as Mr. Lawrence addressed this office September 7, 1880, withdrawing as an attorney before the Department, no action was taken.

My attention is called to the matter by a letter from C. F. Hutchings, as attorney for the settlers, dated the 8th of December last. This is also signed by the Governor of Kansas and other State officers, who urge the institution of a suit in the name of the United States for the purpose of testing the title of the companies to the lands in question.

147 The lands referred to are situated in the overlapping indemnity limits of the grants to the Leavenworth, Lawrence and Galveston Railroad Company, and the Southern Branch of the Union Pacific R. R. Company, now known as the Missouri, Kansas and Texas Railway Company.

This office reported the status of these lands to your predecessor the 2d of May, 1878, in response to a letter from Hon. D. C. Haskell, dated April 11, 1878. It appears from the records that Secretary Schurz transmitted to Mr. Haskell, May 15, 1878, a copy of that report with his opinion of the validity of the title conveyed by the Government.

The history of the grants is quite accurately given in the brief filed by the attorney for the settlers, which seems to avoid the necessity of narrating the details in this letter.

The act of Congress approved March 3, 1863, granted to the State of Kansas certain lands to aid in the construction of two railroads and branches, to wit, the Leavenworth, Lawrence and Galveston, and the Atchison, Topeka and Santa Fé railroads, with a branch from where the latter crosses the Neosho down the valley thereof to the point where the former enters it.

The latter company did not construct the branch as provided by said grant, but assigned its lands and franchises for the same to the

Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas and Texas Railway Company.

It is contended on the part of the settlers that this assignment was not a valid one, and could not invest the M., K. and T. Co. with any of the lands in controversy.

The act approved July 26, 1866, granted to the Union Pacific
148 Railway Company, Southern Branch, now the M., K. and T.
R'y Co., certain lands from Junction City to the south line of the State via Emporia down the Neosho Valley.

This company has claimed and received titles to the lands under both acts of Congress, that of March 3, 1863, and July 26, 1866, under the former as successor of the A., T. and S. Fe Co., but under the latter as a grant direct. It is urged on behalf of the settlers that one company cannot claim the benefit of two grants.

The lands withdrawn April 3, 1867, for the benefit of the grant of July 26, 1866, to the M., K. and T. Co., embrace those withdrawn May 5, 1863, to aid in the construction of the branch of the A., T. and S. Fe road from Emporia down the Neosho Valley to where the L., L. and G. R. R. crosses it.

If the assignment to the A., T. and S. Fe Co. was illegal, then the former acquired no right to the lands under the act of March 3, 1863, and it could not be invested with any title to the lands in the overlapping limits of the grant to the L., L. and G. R. R. under the act of July 26, 1866, for the reason that at the date of the withdrawal for its benefit the lands had been previously reserved by the act of March 3, 1863. If, on the other hand, said assignment is incapable of being set aside, then the right of the M., K. and T. Co. to the lands in the conflicting limits described could attach, under the act of March 3, 1863, to those lands only which are situated west of the line of the L., L. and G. road, since the grant to the A., T. and S. Fe Co. for the branch was to a point where the L., L. and G. railroad enters said valley. Therefore, whatever rights the M., K. and
T. Co. possessed in the conflicting limits east of the L., L. and
149 G. railroad must have vested under the act of July 26, 1866, only, and at the date of that act those lands were reserved for the benefit of the L., L. and G. Co. The ten years allowed for the construction of its road had not expired, and its grant had not been declared forfeited. These lands in the odd-numbered sections which had not been previously sold, reserved, or otherwise disposed of, and not covered by a homestead or pre-emption claim, were thus appropriated to the satisfaction of the grant to the L., L. and G. R. R. Co., yet they were selected jointly by this and the M., K. and T. R'y Co. August 8, 1872, under the acts of March 3, 1863, and July 26, 1866, as to the latter, and the act of March 3, 1863, as to the former company, as per joint list No. 3.

December 17, 1872, there was filed in this office an instrument executed December 13, 1872, by the president of the L., L. and G. R. R. Co., under its seal, which, for the purpose of partition, relinquished for said company all their right, title, and interest in and to these lands to the M., K. and T. R'y Co., their successors and assigns, and requested that patent therefor might issue to the same.

The lands were certified to the State of Kansas the 10th of April, 1873, per approved list No. 8, under the act of March 3, 1863, for the benefit of the M., K. and T. R'y Co.

The right of the L., L. and G. R. R. Co. to odd-numbered sections, in indemnity limits of its grant, was not declared forfeited until the approval of the act of July 26, 1876.

I am of the opinion that the certification of the lands in the odd-numbered sections within the overlapping indemnity limits east of the L., L. and G. railroad was erroneous, and accordingly recommend the institution of the suit in the name of the United States to set aside the company's title to this particular class of lands, although I do not concur in the opinion of the attorney for the settlers as
150 to the title of the company to the odd sections in the overlapping indemnity limits west of the L., L. and G. Railroad, and the title to even-numbered sections in the conflicting limits, yet I believe it the better course to have all the questions raised in the premises passed upon by the courts, and so recommended.

The following lists include the lands referred to in the petition for the settlers, to wit:

Lands in Odd Sections within the Overlapping Twenty-mile Limits of the Grants to the L., L. and G. and M., K. and T. Cos. East of Both Roads, Selected Jointly, Relinquished by the Former and Certified to the State for the Latter Company.

Subdivisions.	Sec.	T'p	R.	Date of selection.	List.	Relinquished by L., L. & G. R. R. Co.	Certified to State for M., K. & T. R'y Co.
S e ¼ n w ¼ and w ½ s e ¼	13	24	20	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
S e ¼ n e ¼ and e ½ s e ¼	27	.....	.....	"	3	"	"
All of	35	.....	.....	"	3	"	"
E ½	1	25	20	"	3	"	"
All	3	.....	.....	"	3	"	"
All	13	.....	.....	"	3	"	"
All	15	.....	.....	"	3	"	"
E ½ n e ¼ and e ½ s e ¼	17	.....	.....	"	3	"	"
All	21	.....	.....	"	3	"	"
151 All	23	25	20	"	3	"	"
All	25	.....	.....	"	3	"	"
All	27	.....	.....	"	3	"	"
N e ¼, e ½ n w ¼ and s ½	29	.....	.....	"	3	"	"
S e ¼ n e ¼ and e ½ s e ¼	31	.....	.....	"	3	"	"
All	33	.....	.....	"	3	"	"
N w ¼ s e ¼, e ½ s e ¼, and w ½	35	.....	.....	"	3	"	"
All	1	26	20	"	3	"	"
N e ¼ n ½ & s w ¼ of s e ¼ and w ½	3	.....	.....	"	3	"	"
All	5	.....	.....	"	3	"	"
E ½ n e ¼ and e ½ s e ¼	7	.....	.....	"	3	"	"
All	9	.....	.....	"	3	"	"
All	11	.....	.....	"	3	"	"
All	13	.....	.....	"	3	"	"
All	15	.....	.....	"	3	"	"
All	17	.....	.....	"	3	"	"
E ½ n e ¼ and e ½ s e ¼	19	.....	.....	"	3	"	"
S w ¼ and e ½ of s w ¼ and e ½	21	26	20	"	3	"	"
All	23	.....	.....	"	3	"	"
Lots 1 and 2	25	.....	.....	"	3	"	"
Lots 1 and 2	27	.....	.....	"	3	"	"
Lots 1 and 2	29	.....	.....	"	3	"	"

152 *Lands in Odd Sections in the Overlapping Indemnity Limits of the Grants to L., L. and G. and M., K. and T. Cos. West of both Roads, Most of Which Were Selected Jointly, Relinquished by the Former and Certified to the State for Latter Company (all in Woodson Co., not in Controversy).*

Subdivisions.	Sec.	T'p.	R.	Date of selection.	List.	Relinquished by L., L. & G. Co.	Certified to State for M., K. & T. R'y Co.
W ½ s e ¼ and s w ¼	27	24	15	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 16, 1873
E ½ n w ¼, e ½ s w ¼, and e ½	33	.....	.....	"	3	"	"
W ½ s e ¼ and s w ¼	35	.....	.....	"	3	"	"
W ½ and s e ¼ of s w ¼	1	25	15	"	3	"	"
S ½ n e ¼	3	.....	.....	July 29, 1874	.....	.....	Feb. 11, 1875
N e ¼ s e ¼	5	.....	.....	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
W ½ n e ¼	9	.....	.....	"	3	"	"
S w ¼	9	.....	.....	July 29, 1874	.....	"	Feb. 11, 1875
W ½ n w ¼, n w ¼ s e ¼, and e ½ s e ¼	11	.....	.....	Aug. 8, 1872 by M., K. & T.	3	Dec. 13, 1872	Apr. 10, 1873
W ½ n e ¼ and e ½ n w ¼	11	.....	.....	Oct. 11, 1872			
N w ¼	15	.....	.....	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
N e ¼ n e ¼, n w ¼ n e ¼, s w ¼, w ½ s e ¼, and s w ¼ n w ¼	23	25	15	Aug. 8, 1872 by M., K & T.	3	Dec. 13, 1872	April 10, 1873
S w ¼ n e ¼, n w ¼ n w ¼, and e ½ n w ¼	23	.....	.....	Oct. 11, 1872			
W ½ n e ¼	25	.....	.....	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
N w ¼, n e ¼, s ½ n e ¼, and e ½ s w ¼	29	.....	.....	"	3	"	"
E ½ s w ¼ and s e ¼	33	.....	.....	"	3	"	"
N w ¼	33	.....	.....	by M., K. & T. June 1, 1881			
N ½ n w ¼	1	26	15	Aug. 8, 1872	3	"	"
153 N w ¼ s e ¼ and e ½ s e ¼	3	.....	.....	"	3	"	"
E ½ n w ¼, e ½ s w ¼, and e ½	5	.....	.....	"	3	"	"
E ½ s w ¼ and s e ¼	9	.....	.....	"	3	"	"
W ½ s w ¼	9	.....	.....	by M., K. & T. June 1, 1881			
All	15	.....	.....	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
E ½ and n w ¼ of n e ¼ and n e ¼ n w ¼	17	.....	.....	"	3	"	"
E ½ s w ¼	17	.....	.....	July 29, 1874	.....	.....	Feb. 11, 1875
All	21	.....	.....	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1872
S ½ n e ¼ and s e ¼	23	.....	.....	"	3	"	"
Lots 1, 2, & 3	25	.....	.....	"	3	"	"
Lots 1, 2, 3, & 4	27	.....	.....	"	3	"	"
Lots 1, 2, & 3	29	26	15	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
W ½	19	25	16	"	3	"	"
S e ¼ and s w ¼	31	.....	.....	"	3	"	"
N e ¼	7	26	16	July 29, 1874	.....	.....	Feb. 11, 1875
N w ¼	7	.....	.....	Aug. 8, 1872	3	Dec. 13, 1872	Apr. 10, 1873
N e ¼ and w ½ of n w ¼, n w ¼ s w ¼, and s ½ s e ¼	19	.....	.....	"	3	"	"
Lots 2, 3, and 4	29	.....	.....	"	3	"	"

154 The following-described lands in the even sections of the overlapping limits (20 miles) of the grants to both of said companies were selected by the M., K. and T. R'y Co.:

Subdivisions.	Sec.	T'p.	R.	Date of selection.	List.	Patented.
E ½ s e ¼	28	24	15	Apr. 14, 1873	3	Nov. 13, 1873
W ½ n e ¼, s e ¼, and w ½	34			"	3	"
N ½ s e ¼ and s w ¼ s w ¼	2	25	15	"	3	"
S ½ s e ¼	2			June 1, 1881		
S e ¼ n e ¼	8	25	15	Apr. 14, 1873	3	Nov. 3, 1873
S e ¼ n e ¼, e ½ n w ¼, and s w ¼ n w ¼	10			"	3	"
N w ¼ and w ½ s w ¼	12			"	3	"
S ½	14			"	3	"
S e ¼	20			"	3	"
N w ¼ and s e ¼	22			"	3	"
N ½ n w ¼	24			"	3	"
N w ¼	26			"	3	"
W ½ s w ¼	32			Nov. 7, 1876		Apr. 26, 1877
N ½ n e ¼ and s w ¼ n e ¼	2	26	15	Apr. 14, 1873	3	Nov. 3, 1873
S e ¼	4	26	15	July 29, 1874		M'ch 19, 1875
S w ¼ n e ¼, w ½ n w ¼, and s w ¼	4			Apr. 14, 1873	3	Nov. 3, 1873
N e ¼ n w ¼, n w ¼ n e ¼, s w ¼, and w ½ s e ¼	8			"	3	"
N e ¼ n ½, and s w ¼ s e ¼, and w ½	14			"	3	"
S e ¼ n w ¼	20			"	3	"
E ½ n w ¼	24			"	3	"
Lots 2, 3, & 4	26			"	3	"
Lots 1, 2, and 3	28			"	3	"
W	18	25	16	"	3	"
E ½ n w ¼ and e ½ s w ¼	30			"	3	"
155 W. ½ s w ¼	30			July 29, 1874		M'ch 19, 1875
W ½ s w ¼	32			May 10, 1876		Aug. 17, 1876
S ½ s w ¼	6	26	16	July 14, 1873	3	Nov. 3, 1873
S e ¼	6			July 29, 1874		M'ch 19, 1875
W ½ n w ¼	8			Nov. 29, 1874		"
N e ¼ and s e ¼	18			"		"
S w ¼	18			Apr. 14, 1873	3	Nov. 3, 1873
Lots 1, 2, 3, and 4	30			"	"	"
W ½	12	24	20	Apr. 14, 1873	3	Nov. 3, 1873
N e ¼ n e ¼	14			"	3	"
E ½ n e ¼, e ½ s w ¼, and s e ¼	34			"	3	"
All	2	25	20	"	3	"
E ½ s e ¼	4			"	3	"
W ½	12			"	3	"
All	14			"	3	"
S e ¼ s w ¼ and e ½	20			"	3	"
All	22			"	3	"
All	24			"	3	"
W ½ n e ¼, w ½ s e ¼, and w ½	26			"	3	"
E ½ s e ¼	26			Nov. 7, 1876		Apr. 23, 1877
S w ¼ n e ¼	26			Oct. 11, 1877		
All	28			Apr. 14, 1873	3	Nov. 3, 1873
N ½	32			"	3	"
N e ¼ n e ¼ and w ½ n w ¼	34			"	3	"
E ½ s w ¼	34			Nov. 7, 1876	3	Apr. 23, 1877
S e ¼ n e ¼ and e ½ s e ¼	2	26	20	Apr. 14, 1873	3	Nov. 3, 1873
S w ¼ n e ¼ and s e ¼ n w ¼	2	26	20	Nov. 7, 1876		Apr. 23, 1877
S ½ n e ¼, n w ¼, w ½ s w ¼, and s e ¼	4			July 29, 1874		M'ch 19, 1875

	Subdivisions.	Sec.	T'p.	R.	Date of selection.	List.	Patented.
156	All	8			Apr. 14, 1873	3	Nov. 3, 1873
	W ½ n w ¼ and s e ¼ s e ¼	10			"	3	"
	All	12			"	3	"
	All	14			"	3	"
	E ½ n e ¼ and e ½ s e ¼	18			"	3	"
	N w ¼	20			"	3	"
	E ½ s w ¼	20			Nov. 7, 1876		Apr. 23, 1877
	All	22			Apr. 14, 1873	3	Nov. 3, 1873
	All	24			"	3	"
	Lots 1 and 2	26			"	3	"
	Lots 1 and 2	28			"	3	"
	W ½ s w ¼	30	24	21	"	3	"
	W ½	6	25	21	"	3	"
	All	30			"	3	"
	N w ¼	32			"	3	"
	E ½ n e ¼, w ½ n w ¼, and s ½	6	26	21	"	3	"
	W ½ n e ¼ and e ½ n w ¼	6	26	21	July 29, 1874		M'ch 19, 1875
	W ½ n e ¼, w ½ s e ¼, and w ½	8			Apr. 14, 1873	3	
	E ½ n e ¼ and e ½ s e ¼	18			July 29, 1874		"
	W ½ n e ¼, w ½ s e ¼, and w ½	18			Apr. 14, 1873	3	Nov. 3, 1873
	All	20			"		M'ch 19, 1875
	Lots 1 and 2	30			July 29, 1874		"
	Lots 3 and 4	30			June 1, 1871	1	Feb. 19, 1872

157 The following papers are respectfully submitted for your consideration, and such action as you deem proper, to wit:

A. Letter of Wm. Lawrence, dated Aug. 31, 1880, enclosing brief.
B. Letter from Gov. of Kansas, Dec. 8, 1881.
C. Resolution by Kansas Legislature, 1876.
D. " " " " 1879.
E. " " " " 1881.
F. Letter from Hon. Geo. R. Peck, dated Dec. 9, 1881.
G. " " Hon. P. B. Plumb, dated Feb. 27, 1882, enclosing letter from W. B. Strong, Pres't K. C., L. and S. K. R. R. Co., assenting to the bringing of the suit.

I am, very respectfully,

N. C. McFARLAND,
Commissioner.

Endorsed: No. 4118. Filed Dec. 20, 1884. A. S. Thomas, clerk.

158 *Defendant's Proof (in Rebuttal) No. 1, "Exhibit "D."*

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 1*st Nov.* 1884.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy from the records of this Department, with which it has been compared.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.] W. L. JUSTYN,
Acting Secretary of the Interior.

159 *Letter of Hon. Carl Schurz to Hon. D. C. Haskell, Authenticated by Certificate of Acting Secretary of the Interior.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 15 *May*, 1878.

Hon. D. C. Haskell, House of Representatives.

SIR: In reply to your letter of the 11th ultimo concerning certain lands within the overlapping limits of the Missouri, Kansas & Texas railroad, and the Leavenworth, Lawrence & Galveston railroad, in the county of Allen, State of Kansas, which have been patented to the former company, I have the honor to transmit herewith a copy of a report of the Commissioner of the General Land Office, dated the 2d inst., relative to the subject-matter of your inquiry.

In addition to what is contained in the Commissioner's report, and in order that you may fully understand the status of the lands within the overlapping limits of said roads, I deem it proper to state that the grant of odd sections of lands to the State of Kansas to aid in the construction of the roads, of which the above mentioned are successors, was made by an act of Congress approved March 3, 1863. (12 Stats., page 772.) As the two grants were made by the same act, it is evident, I think, that neither company acquired priority over the other by virtue of the granting act. The withdrawal of odd sections of lands falling within the twenty-mile limits of both roads was made by letter of the Commissioner of the General Land Office, dated March 19, 1863, received at the local office May 5, 1863. As this was a simultaneous withdrawal, neither company acquired precedence over the other thereby to the lands lying within the overlapping limits.

This grant and withdrawal operated upon and reserved the odd sections of land only, and the rights of the grantees were, in all respects, equal as to the lands lying within said limits.

On August 8, 1872, said lands were selected by both roads as per joint list No. 3.

Subsequently, and on December 13, 1872, the Leavenworth, Lawrence & Galveston Railroad Company relinquished all claim to said lands, and they were thereafter patented to the Missouri, Kansas & Texas Railroad Company, as stated by the commissioners.

As the Missouri, Kansas & Texas road was entitled to in-
160 demnity for lands lost in place to the full amount of the lands so selected, and as the selections were made of lands which had been reserved for indemnity purposes for said road, I am of opinion that there is no defect in the title of the railroad company.

After the Missouri, Kansas & Texas road became possessed of the fee-simple title to the lands it had the right to convey the same to

Leavenworth, Lawrence & Galveston road; and if the conveyance was *bona fide* the title of the latter road thereto is perfect. The act of Congress approved July 24, 1876, declaring a forfeiture of the lands granted to aid in the construction of the Leavenworth, Lawrence & Galveston railroad, except such as had been earned by the construction of said road (19 Statutes, 101), did not declare a forfeiture of the lands granted to aid in the construction of the roads of which the Missouri, Kansas and Texas is the successor, and hence did not affect the status of the lands falling within the indemnity limits of the latter company in Allen county. By act of Congress approved July 26, 1866, the Union Pacific Railroad Company, Southern Branch, now the Missouri, Kansas and Texas Railroad Company, was granted indemnity from any of the public lands of the United States, odd or even sections, within its twenty miles limits, for odd sections lost in place for any of the reasons mentioned in the act. The even sections (being then reserved) were withdrawn for the benefit of said road by letter of the Commissioner of the General Land Office, dated March 19, 1867, received at the local office April 3, 1867. So much of said lands as the road was entitled to *has* been patented, as stated by the Commissioner.

After careful examination of the question presented by your letter, and the accompanying brief and argument, I am of opinion that there is no defect in the title of the Missouri, Kansas & Texas Railroad Company to the odd and even sections of the land lying within the overlapping limits of said roads, and that nothing would be gained by attacking the outstanding patents in the courts.

Very respectfully, C. SCHURZ, *Secretary.*

161 *Defendant's Proof (in Rebuttal) No. 2, Exhibit "D."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov'r 1st*, 1884.

I, J. D. Smith, Acting Commissioner of the General Land Office, do hereby certify that the annexed, on pages one to seven, inclusive, being a copy of a letter dated May 2d, 1878, from the Commissioner of this office to the Secretary of the Interior, concerning the application for suit in the name of the United States to vacate the title of the Leavenworth, Lawrence and Galveston Railroad Company to certain lands in Allen county, Kansas, is a true and literal exemplification of said letter as the same appears of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. D. SMITH,
Acting Commissioner of General Land Office.

162 *Letter of J. A. Williamson, Commissioner of General Land Office, to Hon. Carl Schurz.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 2, 1878.

Hon. Carl Schurz, Secretary of the Interior, Washington, D. C.

SIR: I have the honor to acknowledge the receipt, by reference, of a letter addressed to you by Hon. D. C. Haskell, M. C., dated April 11, 1878.

I am directed to report to you.

Mr. Haskell states that a large number of settlers upon lands in Allen county, Kansas, now claimed by the Leavenworth, Lawrence & Galveston Railway Company, call in question the validity of its title, and for that reason decline to purchase from it; that said company claims title to a portion of the land through a grant from the Missouri, Kansas & Texas Railway Company, under patent to it from the United States; that the Missouri, Kansas & Texas Railway Company claims to be the legal successor to the Union Pacific Railroad Company, Southern Branch, and to the grants for and to that company by acts of Congress approved March 3, 1863, and July 26, 1866; that the grants of the Missouri, Kansas & Texas, and to the Leavenworth, Lawrence & Galveston Companies conflict as to lands in Allen county; that by an amicable arrangement each company took certain tracts or parcels of land, and in settlement deeded to each other so much as secured an equitable division; that the settlers claim that patents to the companies to much of the land were wrongfully issued, and that the title thereto should be yet in the United States, and they (the settlers) be allowed to enter them as in the case of other lands belonging to the United States; that, if there is any possible defect in the title to these lands, he (Mr. Haskell) shall be anxious to have a suit brought in the United States courts to test the question; and he asks that the matter be investigated, to the end that all the facts may be developed and the proper remedy applied, if, in your judgment, there is any defect in the title by which either company claims lands situated in Allen county.

While the letter from Mr. Haskell would seem to ask an investigation and opinion concerning all the lands in Allen county claimed by either of the companies named, it has been ascertained from conversation with him since the date of his letter that the lands to which his inquiry is intended to refer are those within the conflicting and overlapping lines, designating the twenty-mile or "indemnity" limits of either grant.

These lands, so far as Allen county is concerned, are in townships 24 S., 20 E.; 25 S., 20 and 21 E.; and 26 S., 20 and 21 E.

163 An examination shows that the even sections in the described limits and townships, to which title has passed from the United States, were selected by the Missouri, Kansas & Texas Railway Company on August 10, 1872, under the act of July 26th, 1866 (which act only provided for such indemnity by even sections). The selections were certified by the register and receiver at Independence,

April 14, 1873, were embraced in approved list No. 12, dated October 16th, 1873, and patent issued to the company November 3d, 1873, as provided in said act of July 23d, 1866.

The odd sections in described limits and townships, to which title has passed from the United States, were selected by the Missouri, Kansas & Texas Railway Company and the Leavenworth, Lawrence & Galveston Railroad Company (under the act of March 3d, 1863, as to the latter company, by which alone, if at all, it was entitled to any "indemnity" lands, and under the acts of March 3d, 1863, and July 26th, 1866, as to the former). On August 8, 1872, the selections were certified by the register and receiver on the day they were made, and so submitted to this office, as per "joint list No. 3;" on December 17, 1872, there was filed in this office an instrument executed December 13, 1872, by the president of the Leavenworth, Lawrence & Galveston Railroad Company, and under its seal, which, for the purpose of partition, relinquished for their said company "all the right, title, and interest in and to the aforesaid lands (embraced in Independence joint indemnity list No. 3) to the Missouri, Kansas & Texas Railway Company, their successors and assigns, and request that patents therefor may issue to the said Missouri, Kansas
164 & Texas Railway Company." Accordingly said lands were, on April 10, 1873, certified to the State of Kansas as for the benefit of the Missouri, Kansas & Texas Railway Company, per approved list No. 8.

Thus, the only title from the United States to any of the lands in question has passed either by patent direct to or by a certification to the State for the benefit of the Missouri, Kansas & Texas Railway Company. So far as such patenting and certification are concerned I am unable to discover any defect in the title.

Whether or not the Leavenworth, Lawrence & Galveston Railroad Company had any rights in the premises which they could have transferred makes no difference, inasmuch as, under the acts of 1863 and 1866, and the absence of any conflicting claim, the Missouri, Kansas & Texas Railway Company would still have been entitled to all of said lands. I am therefore of opinion that they were legally and regularly patented or approved.

Mr. Haskell's letter does not set forth wherein it is claimed that the title from the United States was wrongfully issued, and in the absence of any specific allegation to that effect, I shall simply discuss the general question raised.

The grants to or for the Missouri, Kansas & Texas Railway Company have been thus far adjusted upon the assumption that under the acts of 1863 and 1866 it was entitled to both odd and even sections within its "indemnity" limits, where the same conflicted with the "indemnity" limits of the Leavenworth, Lawrence & Galveston railroad. I am of opinion that this was and is the proper construction of said acts, but I am unable to find that there has ever
165 been any explicit decision by this office, or by the department, determining the rights of the former company as against the latter.

It was, however, acquiesced by the latter, at least as far as the

lands in Allen county are concerned. The title passed from the United States under that construction and without any opposition.

It has been finally determined that the Leavenworth, Lawrence & Galveston Railroad Company is not entitled to any lands in its "indemnity" limits, but no question has been heretofore raised against the right of the Missouri, Kansas & Texas Company to the lands. That company has received title under an undisputed construction of law, and, in my opinion, all questions concerning such title are *res adjudicatis;* and any attempt to disturb the title before either this Department or Congress would only tend, as I believe, to create uncertainty respecting the power of the companies to sell, and could only result in a complete confirmation of the title as it now rests.

As to the validity of any title to these lands in the Leavenworth, Lawrence & Galveston Company, either by deed from the Missouri, Kansas & Texas Railway Company or by patent from the State of Kansas in pursuance of the "adjustment" between the companies, I have simply to state that, in my opinion, that is a matter which calls for no action on the part of the Government.

If the Missouri, Kansas & Texas Company has seen fit to bestow a portion of the lands upon the Leavenworth, Lawrence & Galveston Company it is not within the province of the United States to interfere therewith, nor can the setting aside of such an arrangement benefit the settlers, for, as before stated, if the title has not vested in the latter company under the partition, it certainly has inured to the Missouri, Kansas & Texas Company under its grant.

The letter from Mr. Haskell is herewith returned.

Very respectfully, your ob't servant,

J. A. WILLIAMSON,
Commissioner.

166 In the Circuit Court of the United States for the District of Kansas.

BENJAMIN HARRIS BREWSTER, Attorney General, &c.,
vs.
KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY.

Now comes the respondent and moves the court for leave to file as additional proof in this case the certified copy herewith submitted of "Circular No. 15, of January 24, 1867, in regard to selections in satisfaction of railroads and other congressional grants" issued by the Commissioner of the General Land Office and approved by the Secretary of the Interior, and for cause of this motion submits and and refers to the annexed affidavits.

GEO. W. McCRARY,
JAS. HAGERMAN,
Counsel for Respondent.

Notice of above application received and same may be submitted at chambers at any time.

July 20th, 1885.

GEO. R. PECK,
Solicitor for Complainant.

167 STATE OF MISSOURI, } ss:
County of Jackson, }

Geo. W. McCrary, being duly sworn, on his oath deposes and says that he is counsel for respondent in this case and had the principal charge of the preparation of the same for trial.

Affiant says that by mutual consent all technical rules respecting the taking and filing of proofs were waived, and it was agreed by counsel that either party should be at liberty to file any documentary evidence at any time before the argument of the case, and, in fact, much of the proof was not filed until the day of the argument.

Affiant says that pursuant to this agreement he caused to be filed all the documentary proof within his knowledge, or which he was able to discover touching the issues in the case.

Affiant states that his attention was not then called particularly to the question whether the proofs filed established the fact that the Secretary of the Interior had caused the lands in question to be selected for the purposes of indemnity under the act of 1866, as affiant then understood and still undorstands the bill to admit the selection, but to charge that it was without authority of law, on the ground that the lands selected had been previously withdrawn and reserved by the order of March 19, 1863, for the use and benefit of the L., L. & G. R. Co. The oral argument was mainly upon this theory.

After the oral argument the Supreme Court of the United States decided in the case of the Kansas Pacific Railway Co. *vs.* A., T. & S. F. R. Co., that the order of withdrawal referred to was void; and in the closing printed argument of counsel for complainant the point was made that the equitable title of respondent is not good under the act of 1866, because the Secretary of the Interior did not cause the selection of the lands in question to be made for in-

168 demnity purposes as required by the first section of that act.

Affiant's attention was then for the first time called to the character of the proof upon this point, and, although he considered it quite sufficient, he, nevertheless, out of abundance of caution, made inquiry at the General Land Office at Washington as to whether there was any further documentary proof upon the point, and has recently ascertained that the instructions of the Commissioner of the General Land Office, approved by the Secretary of the Interior, under which the selections in question were made, were of record in said office.

Thereupon affiant obtained and herewith presents a certified copy of said instructions, and now prays the court for leave to file the same as a part of the documentary proof in this case.

GEO. W. McCRARY.

Subscribed and sworn to before me this 18th day of July, A. D. 1885.

My commission expires Nov. 25th, 1888.

[SEAL.] FRANCIS W. RANDOLPH,
Notary Public.

169 *Order.*

In the Circuit Court of the United States, District of Kansas.

B. F. BREWSTER, Attorney General, Complainant,

vs.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY, Respondent.

On application of the defendants, made to the judge of the above court, it is ordered that defendants have leave to introduce and file, with the proofs in this case, the rules and regulations of the Land Department referred to in the application this day presented to me. July 22, '85.

DAVID J. BREWER,
Judge of said Court.

Endorsed: In the circuit court of the United States, district of Kansas. B. F. Brewster, Attorney General, complainant, *vs.* The Kansas City, Lawrence & Southern Kansas Railroad Company, respondent. Order.

170 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 16, 1885.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, on pages one to sixteen, inclusive, is a true and correct copy of circular No. 15, in regard to selections in satisfaction of railroad and other grants, issued by this office January 27, 1867, and approved by the Secretary of the Interior January 29, 1867.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

WM. A. J. SPARKS,
Commissioner of Gen'l Land Office.

171 JULY 22, 1885.

On motion of counsel for defendant, the proofs are opened & the within circular admitted as evidence in the case.

DAVID J. BREWER,
Circuit Judge.

172 *General Land Office Circular No. 15, of January 24, 1867, Approved January 29, 1863, in Regard to Selections in Satisfaction of Railroads and other Congressional Grants, with Forms for Verification of Lists of Selections, and also of Plats of Survey of such Roads.*

173 Circular No. 15.

Grants from Congress to States and Corporations.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January* 24, 1867.

GENTLEMEN: By the first section of the act of Congress approved July 1, 1864, Statutes 1863-'64, page 335, chap. 196, it is provided that, from and after the passage of that act, "in the location of lands by States and corporations, under grants from Congress for railroads and other purposes (except for agricultural colleges), the registers and receivers of the land offices for the several States and Territories, in the districts where such lands may be located, for their services therein, shall be entitled to receive a fee of one dollar for each final location of one hundred and sixty acres, to be paid by the State or corporation making such location; the same to be accounted for in the same manner as fees and commissions on warrants and preemption locations, with limitations as to maxims of salary prescribed by existing laws, in accordance with such instructions as shall be given by the Commissioner of the General Land Office."

1st. Under this law the registers and receivers are each entitled to receive a fee of one dollar for each final location of one hundred and sixty acres, or any quantity approximate thereto, when the deficit is less than forty acres.

2d. When the several quantities shall have been definitely ascertained by you to inure to the grant, as hereinafter prescribed, the fees will then be due thereon.

3d. The State through its grantee, or the grantee, as the case may be, is required to file with the register and receiver of the proper land office descriptive lists of the tracts of land claimed as inuring under the grant within sections of — miles each along the line of route on both sides thereof, to be dated and verified by the signature of the selecting agent.

For agent's certificate to be attached to each list, see Form A.

The party appearing as the agent of the grantee must file with the register and receiver written and satisfactory evidence, under seal, showing his authority to act in the premises.

174 In the preparation of the descriptive lists the register and receiver will afford the agent all reasonable facilities, taking care, however, not to interrupt the current public business.

The lists must be carefully and critically examined by the register and receiver; their accuracy tested by the plats and records of their office. When so examined and tested, and found correct in all respects, to be a final location; and you will, on the payment of the requisite fee to the receiver, so certify at the foot of each list, according to Form B.

After such lists have been examined and you have attached your certificate thereto the same will be consecutively numbered, commencing with No. 1, for each railroad or separate grant. Upon the payment of the fees and certification of the lists by you the register will post the selections in the tract-book after the following manner: "Selected ——, 186–, by A. B., agent for the —— Railroad Co., act ——, list No. —;" and on the plats he will mark the tracts so selected "—— R. R."

After the selections are properly posted and marked on the plats the lists will be transmitted to this office, accompanied by the evidence of the agent's appointment.

4th. The fees will be due in all cases where the service may have been rendered subsequent to the passage of said act of 1864.

5th. The receiver will account for the fees thus paid in his monthly and quarterly accounts, specially setting forth in the same the particular case or cases on which such fees had accrued, giving the name of road, number, and date of the list of selections for which they had been paid.

6th. By joint resolution No. 10, of January 30, 1865, "mineral lands" are not embraced in the grants made at the first session of the Thirty-eighth Congress, unless otherwise specially provided in the act or acts making the grants.

Pacific Railroads.

Acts approved July 1, 1842, and July 2, 1864.

7th. By section 21 of the latter act these companies are required to pay cost of "surveying, selecting, and conveying" the lands, in addition to the register and receiver's fees exacted by the act of July 1, 1864, before mentioned. This cost of surveying and conveying is, by the decision of the Secretary of the Interior of November 8, 1866, limited to the lands granted by act July 2, 1864. Therefore the "cost" will be assessed and collected on the lands outside of ten miles and within twenty miles from the line of the road, where the grant is under both acts.

To ascertain the cost of "surveying," which includes both surveying in the field and office work, the company will apply to the surveyor general of the State or Territory in which the lands are situated. Upon ascertaining the sums due for surveying and
175 office work for the "section or sections of road" for which selections have been or are to be made, a deposit of those sums must be made to the credit of the Treasurer of the United States, with an authorized depositary. The duplicate of deposit must be filed with the surveyor general; whereupon he will transmit to the register and receiver of the proper land office his certificate of such payment having been made, specifying how much was for surveying and how much for office was, as per Form C.

The surveyor general's certificate, together with the triplicate certificate of deposit and the evidence of the agent's appointment, must accompany the lists of selection when transmitted by you to this office.

8th. Herewith is a form of title-page to be prefixed to the list of selection.

Let me here call your special attention to the necessity of great care in the examination and testing of these lists, so that all conflicts may be avoided and improper selections be excluded, and that the verified schedules may be absolutely accurate, thus avoiding embarrassment and delay to all concerned.

9th. Pacific railroad act, July 2, 1864.—It is provided in section 4 that the word "mineral," when it occurs in that act, shall not be held to include iron and coal. Therefore, iron and coal lands are subject to selection by the Pacific railroads; but all other minerals are expressly excluded from the grant, and must necessarily be so from all selections you may certify to this office. When the verified lists are received at the General Land Office, prepared and certified as above required, such definitive action as the law requires will be here taken, with the view to invest the grantee with a complete title.

These instructions will supersede those of May 30, 1866, Circular No. 9. The forms attached hereto, which are made a part hereof, will be followed in certifying to maps and lists, where the same may be applicable.

You will please acknowledge the receipt of this circular, giving the date of reception.

JOS. S. WILSON,
Commissioner.

To the registers and receivers of the United States land offices.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January* 29, 1867.

The foregoing rules are approved.

O. H. BROWNING,
Secretary.

176 *Form for Title-Page.*

—— OF ——,
UNITED STATES LAND OFFICE ——,
——, 186–.

The ——, under and by virtue of the acts of Congress entitled "——," and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said company as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said acts of Congress, and the location of the line of route of the —— of said company; being for the —— section (—— miles) of the same, commencing at —— and ending ——; the selections being particularly described as follows, to wit: ——

177 (A.)

—— OF ——, }
County of ——, } *ss:*

I, —— ——, being duly sworn, depose and say that I am the land agent of the ——, formerly the ——; that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said —— company as inuring to ——, to aid in the construction of the —— from ——, for which a grant of lands was made by the acts of Congress approved ——; that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant, being within the limits of —— miles on each side of the line of route for a continuous distance of —— miles, being for —— section of said road, starting from —— and ending ——.

—— ——. [L. S.]

Sworn and subscribed before me this — day of ——, ——.

—— ——.

NOTE.—This affidavit may be made before either the register or receiver of the United States land office.

178 (B.)

UNITED STATES LAND OFFICE,
——, 186–.

We hereby certify that we have carefully and critically examined the foregoing list of lands, claimed by the ——, under the grant to the ——, by acts of Congress approved ——, and selected —— by —— ——, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of —— miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, State, or other valid claim to any portion of the said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices; and that the said company have paid to the undersigned, the receiver, the full sum of ——, in full payment and discharge of said fees.

—— ——, *Register.*
—— ——, *Receiver.*

179 (C.)

UNITED STATES SURVEYOR GENERAL'S OFFICE,
—— ——, 186–.

I, —— ——, surveyor general for the United States in and for the ——, hereby report and certify that the —— has this day filed with me, at ——, a duplicate certificate of deposit, No. —, dated —— of the ——, to the credit of the Treasury of the United States, showing that the sum of $—— has been deposited as cost of survey and $—— for office work, and that the said sums are the correct amount of the cost of survey and office work for the lands mentioned and described in the list of lands hereto annexed, to the extent of said list.

Survey, $——.

Office work, $——.

In testimony whereof I have hereunto set my hand and official seal.

——— ———,
Surveyor General.

Certificates for Maps of the Surveys and Permanent Locations, etc.

Form No. 1. Of engineer's affidavit to map of definite location.

Form No. 2. Of president and engineer's certificate to same.

Form No. 3. Of engineer's affidavit to map of completed portion of railroad.

Form No. 4. Of president's certificate to same.

Form No. 5. Of engineer's affidavit to map of definite location where grant was made to a State or Territory.

Form No. 6. Of certificate of Governor of State or Territory to map of definite location.

Form No. 7. Of certificate of Governor to map of completed portion of railroad.

Nos. 1, 2, 3, and 4 to be used when grant was direct to the railroad.

Nos. 1, 3, 4, 5, 6, and 7 to be used when grant was made to the State or Territory.

180 (No. 1.)

—— OF ——,
County of ——, } *ss:*

—— ——, of ——, in said county and ——, being duly sworn, deposeth and says that he is the chief engineer of the ——, and has been such chief engineer since the ——; that during the period above named —— —— were employed by this deponent as chief engineer- for said railroad company, as deputy or division engineers; that the said engineers, as shown by their field notes, verified under oath, did actually survey and mark upon the ground the line or route of the —— from —— to ——, in the sections and at the times respectively designated by dates, which are included between the flag-staffs upon and along the line of route of said railroad as deline-

ated on this map, showing the line of the public survey in connection with the surveyed line of the route; and that the acts of said deputy or division engineers in the premises were duly approved and accepted on behalf of said company by this deponent as said chief engineer of the ——.

——— ———,
Chief Engineer.

[Revenue stamp.]

Sworn and subscribed this —— day of ——, before me,
[SEAL.]
——— ———,
Notary Public.

The map of location must, as shown in the above form, in all cases show the lines of the public survey in connection with the line of route.

181 (No. 2.)

OFFICE OF THE ——,
——— ———,
——, 186–.

It is hereby certified that, in pursuance of the act of Congress approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," wherein a grant of lands is made by the —— section to the ——, who are thereby authorized to construct a railroad and telegraph line from ——, and the act of July 2, 1864, amendatory thereof, which —— —— to construct said railroad, this map shows the location of the line or route of the —— from —— to ——, being a part of the line or route of said railroad as definitely fixed, in compliance with said acts of Congress and in pursuance of the resolution of the board of directors of said company, passed on the ——; and that the dates of the field work thereof are truly indicated along the line, from station to station, upon this map.

In testimony whereof the —— has caused the same to be signed by its president and engineer and has attached hereunto its corporate seal at ——, on the day and year first above written.

[SEAL.] ——— ———, *President.*
——— ———, *Chief Engineer.*

Attest: ——— ———, *Secretary.*

182 (No. 3.)

—— OF ——,
County of ——, } *ss:*

——— ———, of ——, in said county and ——, being duly sworn, deposeth and says that he is the chief engineer of the said railroad from —— to ——, being for —— section of —— miles, as shown by the line of route in connection with the lines of the public sur-

veys on this map; that it has been completed and equipped as required by law, and that this line of route shows the correct location of the said railroad.

[SEAL.]

——— ———,
Chief Engineer.

[Revenue stamp.]

Sworn and subscribed this ——— day of ———, before me.

[SEAL.]

——— ———,
Notary Public.

183 (No. 4.)

It is hereby certified that ——— ——— is the chief engineer of the ———, and that the location of the road, as represented on this map, is correct and approved by the company; and also that the said portion of the said road has been completed and equipped in all respects as required by law.

——— ———, *President.* [SEAL.]

Attest:
[SEAL.] ——— ———, *Secretary.*

184 (No. 5.)

OFFICE OF THE ———,
——— ———,

It is hereby certified that, in pursuance of the act of the Legislative Assembly of the ———, approved ———, entitled "——— ———," this map shows, in connection with the public surveys, the actually surveyed line of route of the ——— from ——— to ———, as definitely fixed, in compliance with the act of Congress approved ———, and in pursuance of the resolution of the board of directors of said railroad company, passed on the ——— day of ———; and that the dates of the field work thereof are truly indicated along the line, from station to station, upon this map.

In testimony whereof the ——— has hereunto attached its corporate seal and caused the same to be signed by the president and ———, at ———, in the day and year first above written.

[SEAL.]

——— ———, *President.*
——— ———, *Chief Engineer.*

Attest: ——— ———, *Secretary.*

185 (No. 6.)

I, ——— ———, Governor of the ———, do hereby certify that this plat or map of the ——— has been duly filed in my office by the railroad company, and shows, in connection with the public surveys, the location of the line of route as actually surveyed of the ——— ——— "from ——— to ———," as definitely fixed in compliance with the act of Congress approved ———, entitled "An act ———," and with the act of the Legislative Assembly of the ——— approved ———, entitled "———," granting certain lands to the railroad herein named.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the ——.

Done at —— this —— day of ——.

[SEAL.] —— ——, *Governor.*

Attest: —— ——,
Secretary of ——.

186 (No. 7.)

EXECUTIVE OFFICE, —— ——,
—— ——.

I, —— ——, Governor of the —— ——, do hereby certify that this plat or map of the —— has been duly filed in my office by the said —— company, and shows that portion of the said railroad commencing at —— and ending at ——, which has been completed and equipped as required by the act of Congress approved ——, and the act of the Legislative Assembly of the ——, approved ——, entitled "——," granting lands to the said railroad company.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the ——.

Done at —— this —— day of ——.

[SEAL.] —— ——, *Governor.*

Attest: —— ——,
Secretary of ——.

187 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1884, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *Dec. 4th*, 1884.

BENJAMIN HARRIS BREWSTER, Attorney General, for and on behalf of the United States,
vs.
KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY. } 4118.

This suit came on to be heard and was argued by counsel and submitted, the complainant to have 30 days to file briefs and defendant 30 days thereafter to file briefs.

188 *Decree.*

UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

In the Circuit Court of the United States for the District aforesaid.
In Equity.

BENJAMIN HARRIS BREWSTER, Attorney General of the United States, for and on behalf of the United States, Complainant,

vs.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY, Defendant.

This cause came on to be heard at the November term, 1884, before the Honorable David J. Brewer, judge of said court, upon the bill, answer, replication, proofs, exhibits, and documentary evidence, and was argued by George R. Peck and C. F. Hutchings, solicitors for complainant, and by George W. McCrary and James Hagerman, solicitors for defendant, and taken under advisement by said court.

And now, on this 3rd day of September, 1885, said court being fully advised in the premises, doth find the equity of the cause with the complainant, and doth now order, adjudge, and decree that the title to said lands described in the bill of complaint herein is vested in the United States of America, and that the patent of the
189 State of Kansas to the Missouri, Kansas & Texas Railway Company, mentioned in the bill and bearing date May 19, 1873, and the certification of the Commissioner of the General Land Office to the said State of Kansas of the said lands for the benefit of the said Missouri, Kansas & Texas Railway Company, be, and the same hereby are, declared, adjudged, and decreed to be null and void and without authority of law, and the same are hereby cancelled-annulled, set aside, and held for naught.

And it is hereby further ordered, adjudged, and decreed that the said defendant has no right or title, either in law or in equity, to said lands, and the said defendant is hereby perpetually enjoined and restrained from setting up any claim or title, either in law or in equity, in or to any of said lands, to wit:

Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w ½ se	13	24	20
S e, n e, & e ½ se	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½ n e & e ½ se ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20

	Subdivisions.	Sec.	T's.	R'e.
	All	33	25	20
190	W ½ n w, s e & e ½ s e	35	25	20
	S ½	19	25	21
	W ½	29	25	21
	All	31	25	21
	All	1	26	20
	N ½ s w ¼, w ½ s e, & n e s e	3	26	20
	All	5	26	20
	E ½ n e & e ½ s e	7	26	20
	All	9	26	20
	All	11	26	20
	All	13	26	20
	All	15	26	20
	All	17	26	20
	E ½ n e & e ½ s e ¼	19	26	20
	E ½ e ½ s w & s w s w	21	26	20
	All	23	26	20
	Lots 1 & 2	25	26	20
	Lots 1 & 2	27	26	20
	Lots 1 & 2	29	26	20
	W ½	5	26	21
	All	7	26	21
	W ½ n e ¼, w ½ s e ¼, & w ½	17	26	21
	All	19	26	21
	Lots 1 & 2	29	26	21

191 It is further ordered that the defendant pay the costs of this suit, taxed at $——, and that execution issue therefor.

From this decree the defendant prays an appeal, which is allowed, and the bond of appeal fixed at $1,000.00.

DAVID J. BREWER,
Circuit Judge.

Endorsed: No. 4118. U. S. circuit court. Benjamin Harris Brewster, Att'y General, &c., *vs.* The Kansas City, Lawrence and Southern Kansas R. R., defendant. Decree. Filed Sept. 3, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Geo. R. Peck, solicitor for complainant.

Appeal Bond.

192 In the Supreme Court of the United States. In Equity.

BENJAMIN HARRIS BREWSTER, Attorney General of the United States, for and on behalf of the United States of America, Complainant and Appellee,

vs.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY, Defendant and Appellant.

Appeal from the circuit court of the United States for the district of Kansas.

Know all men by these presents that we, E. Wilder and John R.

Mulvane, are held and firmly bound unto Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States of America, complainant and appellee, in the sum of one thousand dollars, payable to him, his successors, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this October 7th, 1885.

Whereas lately a decree, in a suit depending in said court between Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States of America, complainant, and the Kansas City, Lawrence & Southern Kansas Railroad Com-
193 pany, defendant was rendered against the said defendant, and the said defendant, having been allowed an appeal by order of said court to reverse the said decree, and a citation directed to the said Benjamin Harris Brewster, Attorney General of the United States, citing and admonishing him to be and appear at a supreme court of the United States, to be holden at Washington, the third Monday of October next:

Now, the condition of the above obligation is such that if the said defendant and appellant shall prosecute its appeal to effect and answer all damages and costs if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

E. WILDER. [SEAL.]
J. R. MULVANE. [SEAL.]

Approved Oct. 8, 1885.

C. G. FOSTER, *Judge.*

Endorsed: No. 4118. In the Supreme Court of the United States. Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States of America, complainant and appellee, *vs.* The Kansas City, Lawrence & Southern Kansas Railroad Company, defendant and appellant. Appeal bond. Filed Oct. 8, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

194 UNITED STATES OF AMERICA:

The President of the United States to Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the third Monday of October, 1885, of said Court, pursuant to an appeal allowed in the United States circuit court for the district of Kansas, wherein the Kansas City, Lawrence & Southern Kansas Railroad Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. G. Foster, judge of the circuit court of the United States for district of Kansas, this 8th day of October, 1885.

C. G. FOSTER, *Judge.*

Received a copy of the above, and service accepted, this 8th day of October, 1885.

GEO. R. PECK,
Solicitors for Complainants and Appellees.

195 [Endorsed:] No. 4118. In the Supreme Court of the United States. Benjamin Harris Brewster, Att'y Gen'l of the United States, comp. & app'e, *vs.* The Southern Kansas Railroad Company, def. & app't. Citation. Filed Oct. 8, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

196 UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the entire record, pleadings, evidence, and original citation in the suit of Benjamin Harris Brewster, Attorney General of the United States of America, for and on behalf of the United States of America, *vs.* The Kansas City, Lawrence and Southern Kansas Railroad Company, No. 4118 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 12th day of October, A. D. 1885.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

A. S. THOMAS, *Clerk,*
By FRANK J. THOMAS, *Deputy.*

Endorsed on cover: Kansas C. C. U. S. No. 1147. The Kansas City, Lawrence & Southern Kansas Railroad Company, appellant, *vs.* Benjamin Harris Brewster, Attorney General of the United States, for and on behalf of the United States of America. Filed October 19, 1885.

118-682

Office Supreme Court U. S.
FILED.
OCT 5 1886
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY,
Appellant,
vs.
BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL, &c.

} ***EQUITY.***

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT OF STATUTES AND RECORDS OF THE INTERIOR DEPARTMENT, RELIED UPON IN THE ARGUMENT FOR APPELLANT.

KANSAS CITY:
FOOTE'S PANTAGRAPH PRINT, SHEIDLEY BUILDING, COR NINTH & MAIN.
1886.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY,

Appellant,

vs.

BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL, &c.

} ***EQUITY.***

Appeal from the Circuit Court of the United States for the District of Kansas.

STATEMENT OF STATUTES AND RECORDS OF THE INTERIOR DEPARTMENT, RELIED UPON IN THE ARGUMENT FOR APPELLANT.

KANSAS CITY:
FOOTE'S PANTAGRAPH PRINT, SHEIDLEY BUILDING, COR. NINTH & MAIN.
1886.

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STATEMENT OF STATUTES AND RECORDS.

This is a bill in equity, brought by the Attorney-general, on behalf of the United States, to quiet the title to certain lands in Allen county, Kansas.

The complainant below (appellee), insists that the lands in controversy are public lands, never having been lawfully disposed of by the United States.

The title of the respondent (appellant), is derived under the several land grant acts of Congress, the several acts of the legislature of Kansas, and the proceedings had thereunder, including the construction of the line of railroad provided for, all which is hereinafter fully set forth.

The claim of the appellant is, that by virtue of these statutes and proceedings, and by virtue of having actually constructed the railroad provided for, the title to the lands in controversy was vested in the Missouri, Kansas & Texas Railroad Company (formerly Union Pacific Railroad Company, Southern Branch), from which appellant derives title by conveyance. The controlling question therefore is, *Did that company acquire either the legal or equitable title to the lands?*

The several statutes and the action had thereunder, upon which the appellant bases its claim, both to the legal and equitable title to the lands in controversy, are as follows:

EXTRACTS FROM CHARTER OF ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, BEING ACT OF TERRITORIAL LEGISLATURE OF KANSAS. FEB. 11, 1859.

AN ACT INCORPORATING THE ATCHISON AND TOPEKA RAILROAD COMPANY.

Be it enacted by the Governor and Legislative Assembly of Territory of Kansas:

SECTION 1. That S. C. Pomeroy, C. K. Holliday, Luther C. Challis, Peter T. Abell, Milton C. Dickey, Asaph Allen, Samuel Dickson, Wilson L. Gordon, Geo. S. Hillyer, Lorenzo D. Bird, Jeremiah Murphy, George H. Fairchild and F. L. Crane, with such other persons as may associate with them for that purpose, are hereby incorporated a body politic and corporate, by the name of the Atchison and Topeka Railroad Company; and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places; may make and use a common seal and alter or renew the same; be capable of contracting and being contracted with; and are hereby invested with all powers and privileges, immunities and franchises, and of acquiring by purchase or otherwise, and of holding and conveying real and personal estate, which may be needful to carry into effect fully the purposes and objects of this act.

SEC. 2. The said company is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, from or near Atchison, on the Missouri river in Kansas territory, to the town of Topeka in said territory, and to such point on the southern or western boundary of said territory, in the direction of Santa Fé, New Mexico, as may be most convenient, suitable for the construction of

said road ; and also to construct a branch of said railroad to any point on the southern boundary of said territory of Kansas in the direction of the Gulf of Mexico.

SEC. 3. The said company are hereby authorized and shall have the right of way, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding one hundred feet in width, through the entire length of said road, upon such route as may be determined ; and for the purpose of depots, side tracks, cuttings and embankments, for building engine-houses and shops, or wood and water stations, may take such land, earth or material, as may be necessary for the construction or completion, preserving or maintaining said road.

* * * * * * * * *

SEC. 9. It may be lawful for said railroad company, their agents or engineers, for the purpose of exploring, surveying or locating said road, to enter upon any lands, doing no unnecessary damage, without the consent of the owner, and may acquire by release, donation or otherwise, any lands, and may hold the same, or convey to others, or use same in any manner deemed for the interest of said company.

* * * * * * * * *

SEC. 20. This company shall have the power to make such contracts and arrangements with other railroads which connect with or interest the same, as may be mutually agreed upon by the parties, for the leasing or running their roads, or any part thereof, in connection with roads in other States ; and shall be empowered to consolidate their property and stock with each other, such consolidation to take place whenever such companies shall respectively agree upon the terms and conditions thereof ; and shall have all the powers, privileges and liabilities that they may hold by their several charters, by filing a copy of such articles of consolidation in the office of the secretary of this territory.

LAND GRANT ACT OF CONGRESS OF MARCH 3, 1863.

CHAP. XCVIII.—AN ACT FOR A GRANT OF LANDS TO THE STATE OF KANSAS, IN ALTERNATE SECTIONS, TO AID IN THE CONSTRUCTION OF CERTAIN RAILROADS AND TELEGRAPHS IN SAID STATE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and is hereby granted to the state of Kansas, for the purpose of aiding in the construction—first, of a railroad and telegraph from the city of Leavenworth by the way of the town of Lawrence, and via the Ohio City crossing of the Osage river, to the southern line of the state, in the direction of Galveston bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fé Railroad, where said road intersects the Neosho river; second, of a railroad from the city of Atchison, via Topeka, the capital of said state, to the western line of the state, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where this last named road crosses the Neosho, down said Neosho valley to the point where the said first named road enters the said Neosho valley, every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to

tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the state of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case be located further than twenty miles from the lines of said roads and branches: *Provided further*, That the lands hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further*, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right-of-way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land, which, by such grant shall remain to the United States, within ten miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry

until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: *Provided*, That actual and *bona fide* settlers, under the provisions of the preemption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided also*, That settlers on any of said reserved sections, under the provision of the homestead law, who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

Sec. 3. *And be it further enacted*, That the said lands hereby granted to said state *shall be subject to the disposal of the legislature thereof*, for the purposes aforesaid, and no other; and the said railroads and branches shall be and remain public highways, for the use of the government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States.

Sec. 4. *And be it further enacted*, That the lands hereby granted to said state shall be disposed of by said state only in manner following, that is to say: when the governor of said state shall certify to the Secretary of the Interior that any twenty consecutive miles of either of said roads or branches is completed in a good, substantial and workmanlike manner, as a first-class railroad, and the said Secretary shall be satisfied that said state has complied in good faith with this requirement, the said state may cause to be sold all the lands granted as aforesaid, situated opposite to, and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section of twenty miles of road, and

no further. And when the Governor of said state shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said roads or branches, twenty consecutive miles in extent, connecting with the preceding section, is completed as aforesaid, the said state may cause to be sold all the lands granted and situated opposite to and within the limit of ten miles of the line of said completed section of road, and extending the length of said section, and so, from time to time, until said roads and branches are completed. And when the Governor of said state shall so certify, and the Secretary of the Interior shall be satisfied, that the whole of said roads and branches and telegraph are completed in a good substantial and workmanlike manner, as first-class railroads and telegraph, the said state may cause to be sold all the remaining lands granted and selected for the purposes indicated in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches: *Provided*, That if any part of said roads and branches is not completed within ten years from the passage of this act, no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported over said roads and branches, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.

Approved March 3, 1863.

ACT OF THE LEGISLATURE OF KANSAS ACCEPTING GRANT OF CONGRESS OF MARCH 3, 1863.

AN ACT TO ACCEPT A GRANT OF LAND MADE TO THE STATE OF KANSAS BY THE CONGRESS OF THE UNITED STATES, TO AID IN THE CONSTRUCTION OF CERTAIN RAILROADS AND TELEGRAPHS IN SAID STATE, AND TO APPLY THE SAME TO CONSTRUCTION OF SUCH ROADS AND TELEGRAPHS.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. The state of Kansas hereby accepts the grant of lands made to this state by the Congress of the United States, by act entitled "An Act "for a grant of lands in the state of Kansas, in al- "ternate sections, to aid in the construction of cer- "tain railroads and telegraphs in said state," approved March 3, 1863, upon the terms and conditions set forth in said act of Congress.

SEC. 2. In consideration that the Leavenworth, Lawrence & Fort Gibson Railroad and Telegraph Company shall construct a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage river to the southern line of the state, in the direction of Galveston bay, in the state of Texas, with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fé railroad, where said road intersects the Neosho river, the State of Kansas hereby agrees to grant, bargain and sell to said Leavenworth, Lawrence & Fort Gibson Railroad Company all that portion of the lands granted to this state by the above-named act of Congress applicable to the construction of the above-described railroad and telegraph, and the above described branches thereof, and which shall be selected or

located in conformity with the provisions of the above-mentioned act of Congress. And the said state of Kansas further agrees, and it is hereby enacted, that so soon as said Leavenworth, Lawrence & Fort Gibson Railroad company shall complete any twenty consecutive miles of either said road or branch, as required by said act of Congress, the Governor of this state shall by patent convey to such company all the lands granted as aforesaid which shall be situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section, and no further; and so from time to time until said road and branch shall be completed. And whenever said road, branch and telegraphs shall be completed, as required by said act of Congress, the Governor shall convey to said company all the remaining land granted by said act of Congress and applicable to the construction of said road, branch and telegraphs: *Provided, however*, That said agreement for the sale of said lands, and all conveyances thereof, shall be for the uses and purposes, and subject to the conditions, reversions and provisions set forth and contained in said act of Congress and in this act: *And provided further*, That at the point of intersection of said road and branch, there shall be an equal division of the lands granted to aid in building said road and branch.

Sec. 3. In consideration that the Atchison, Topeka & Santa Fé Railroad Company, formerly the Atchison & Topeka Railroad Company, shall construct a railroad from the city of Atchison via Topeka to the western line of said state, in the direction of Fort Union and Santa Fé, New Mexico, *with a branch from where said road crosses the Neosho down the said Neosho valley to the point where the Leavenworth, Lawrence & Fort Gibson railroad enters said Neosho valley*, the state of Kansas hereby agrees to grant, bargain and sell to said Atchison, Topeka & Santa Fé Railroad Company all that portion of the lands granted to this state by the

above-named act of Congress, applicable to the construction of the herein above described railroad and branch thereof, and which shall be selected and located in conformity with the provisions of the above-named act of Congress. And the said state does further agree, and it is hereby enacted, that whenever said Atcheson, Topeka & Santa Fé railroad Company shall complete any twenty consecutive miles of either said road or branch, as required by said act of Congress, the Gouernor of this state shall, by patent convey to said Atchison, Topeka & Santa Fé Railroad Company all the lands granted as aforesaid, and which shall be situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section and no further; and so from time to time until said road and branches shall be completed as required by said act of Congress. And whenever said road and branch shall be thus completed, the Governor of this state shall convey to said company all the remaining lands granted by said act of Congress, and applicable to the construction of said road aud branch: *Provided, however,* That said agreement for the sale of said lands and all conveyances thereof shall be for the uses and purposes, and subject to the conditions, reversions and provisions set forth and contained in said act of Congress and in this act: *And provided, further,* That if the Congress of the United States shall, on or before the fourth day of March, 1866, consent that the Neosho valley Branch of the above named road may be extended so as to intersect the Union Pacific Railroad, Eastern Division, at or near Fort Riley and shall make a grant of land for such extension of like amount with that granted per mile for the construction of the herein above-named principal road, then said Atchison, Topeka & Santa Fé Railroad Company shall proceed to construct such branch to such intersection, on the terms and conditions herein above prescribed, applicable to the construction of such main road.

SEC. 4. Each of said companies shall file in the office of the Secretary of State, within six months after the passage of this act, a copy of the acceptance by the Board of Directors of such company of the provisions of this act, duly certified under the seal of said company, and in default thereof, all grants and provisions herein contained shall, as to the company so failing, cease and be void.

SEC. 5. Said companies shall respectively within one year after its road shall have been definitely located, file in the office of the Secretary of State, a map or profile thereof, and of the land reserved or taken for the use of said road, and shall also file maps of the parts of such roads and lands in the office of the Register of Deeds of the several counties through which such roads shall pass.

SEC. 6. The right-of-way upon and across all lands belonging to this state, to a distance of one hundred feet in width, together with the right to construct and use upon such lands all turn-outs and water stations, is hereby granted to said companies respectively, for the use of their respective roads.

SEC. 7. Immediately after the passage of this act, the Secretary of State shall cause the same to be published once in the Topeka *Tribune*, and it shall thereafter be in force.

Approved February 9, 1864.

THOMAS CARNEY, *Governor.*

I hereby certify the foregoing to be a true copy of the enrolled law on file in my office, and that the same was published in the Topeka *Tribune* for Feb. 13, 1864.

W. W. H. LAWRENCE,
Secretary of State.

ACCEPTANCE BY A., T. & S. F. R. R. Co. OF ACT OF LEGISLATURE OF KANSAS OF FEB. 9, 1864.

[Filed with Secretary of State of Kansas, August 4, 1864.]

HON. W. W. H. LAWRENCE, *Secretary of State for Kansas, Topeka, Kansas.*

SIR: At a meeting of the Board of Directors of the Atchison, Topeka & Santa Fé Railroad Company, held at the office of the state Treasurer, in the city of Topeka, on the 16th day of February, 1864, a quorum being present, the following resolution was adopted, in accordance with the provisions of the 4th section of the act of the Kansas legislature, entitled "An act to accept a grant of lands "made to the state of Kansas, by the Congress of "the United States, to aid in the construction of "certain railroads and telegraphs in said state, and "to apply the same to the construction of such "roads and telegraphs," approved February 9, 1864, to-wit:

Resolved, That the Atchison, Topeka & Santa Fé Railroad Company hereby accepts the provisions of an act of the legislature of the state of Kansas, entitled "An act to accept a grant of lands made to "the state of Kansas, by the Congress of the United "States, to aid in the construction of certain railroads and telegraphs in said state, and to apply the same to the construction of such roads and telegraphs," approved February 9, 1864.

NOW, THEREFORE, I, Samuel C. Pomeroy, President of the Atchison, Topeka & Santa Fé Railroad Company, do hereby certify that the foregoing resolution of acceptance was duly proposed and adopted at the meeting of the board of directors of said Atchison, Topeka & Santa Fé Railroad Company, as especially narrated at the beginning of this instrument.

IN TESTIMONY WHEREOF, I hereunto subscribe my name, and cause the seal of our said railroad company to be impressed, at the city of New York, on this, the twenty-first day of July, A. D. 1864.

[SEAL.] S. C. POMEROY,

President of the Board of Directors of the Atchison, Topeka & Sonta Fe Railroad Company.

Attest: C. K. HOLLIDAY,

Secretary and Director of the Atchison, Topeka & Santa Fe Railroad Company.

[To the foregoing was attached the certificate of the Secretary of State of Kansas.]

LAND GRANT ACT OF CONGRESS OF JULY 1, 1864.

CHAP. CXCVIII.—AN ACT OF MAKING AN ADDITIONAL GRANT OF LANDS TO THE STATE OF KANSAS TO AID IN THE CONSTRUCTION OF RAILROAD AND TELEGRAPH LINES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and hereby is granted to the state of Kansas, to aid in the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in said state, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: *Provided*, That this grant shall be subject to all the provisions, restrictions, limitations and conditions, in regard to selection and location of lands and otherwise, of an act of Congress, approved March 3, 1863, entitled "An act for a grant of lands to the "state of Kansas, in alternate sections, to aid in the

"construction of certain railroads and telegraphs "in said state." *Provided.* That said railroad shall be a public highway, and shall transport troops and munitions of war of the United States free of charge.

SEC. 2. *And be it further enacted,* That the branch railroad and telegraph from "Lawrence, by "the valley of the Wakarusa river, to a point on the "Atchison, Topeka & Santa Fé Railroad, where said "road intersects the Neosho river," to aid in the construction of which a grant of lands was made by the said act of 3d of March, 1863, shall be so changed as to run from Lawrence to Emporia, and have and receive the grant of lands made by said act: *Provided,* That the line of railroad and telegraph from Leavenworth, by way of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state in the direction of Galveston Bay, shall run via Baldwin City.

Approved July 1, 1864.

ACT OF KANSAS LEGISLATURE, OF FEBRUARY 13, 1865.

AN ACT TO PROVIDE FOR THE INCORPORATION, AND REGULATION OF RAILROAD COMPANIES.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That any number of persons, not less than nine, associating for the purpose of constructing a railroad, shall subscribe to a statement which shall specify as follows: First, the name assumed by such company, and by which it shall be known. Second, The name and place of residence of each of the persons forming the association. Third, the name of the place or places of the termini of said road. Fourth, The proposed amount of capital stock of said company, which shall not be

less than five thousand dollars per mile of said railroad. Such statement, verified by the affidavit of three or more of the persons therein named, shall be acknowledged before some one authorized to take the acknowldgment of deeds, and filed in the office of the Secretary of the State, to be by him recorded in a book kept for that purpose, and a copy thereof, duly certified by the Secretary of State, shall be evidence of the existence of such company.

SEC. 2. That when such certificate shall have been filed and recorded as aforesaid, the persons named as corporators therein are hereby authorized to carry into effect the objects named in said certificate, in accordance with the provisions of this act; and they and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter he deemed a body corporate, with succession, with powers to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation; to make and use a common seal, and the same to alter at pleasure, and to do all acts necessary to carry into effect the objects for which said company was created; and such company shall possess all the powers and be subject to all rules, liabilities and restrictions provided by this act: *Provided*, That any corporation or corporations formed and organized or consolidated under the provisions of this act, exercising or attempting to exercise, any banking powers under any pretense whatever, or the business broker or brokerage, shall forfeit their right of incorporation or consolidation, under or by virtue of this act.

SEC. 3. Any corporation formed in pursuance of this act shall be, and is, hereby authorized to construct and maintain a railroad with single or double track, with such side-tracks, turnouts, offices and depots as it may deem necessary, between the

points named in the certificate, commencing at or within and extending to, or into any town, city or village along the line of said road, or named as the place of the terminus of such road, and construct branches from the main line to other towns, or places within the limits of any county through which said road may pass.

SEC. 4. The capital stock of such company shall be divided into shares of one hundred dollars each, and consist of such sums as may be named in the certificate; such shares shall be regarded as personal property, and shall be subject to execution at law.

* * * * * *

SEC. 15. Such company may acquire by purchase or gift any land in the vicinity of such road, or through which the same may pass, so far as may be deemed convenient or necessary by such company to secure the right-of-way *or such as may be granted to aid in the construction of such roads*, and the same to hold or convey in such manner as the directors may prescribe; and all deeds and conveyances made by such company shall be signed by the president, under the seal of the corporation; and any existing railroad corporation may accept the provisions of this act, and after such acceptance all conflicting provisions of their respective charters shall be null and void.

* * * * * *

SEC. 26. All acts of a general nature relating to railroad corporations and relating to the condemnation and appropriation of lands, and not inconsistent with this act, shall be applicable to corporations created under this act.

* * * * * *

Approved, February 13, 1865.

FROM GENERAL LAWS OF KANSAS WHICH TOOK EFFECT OCT. 31, 1868 (SEE COMPILED LAWS OF KANSAS, 1883, PAGE 210 ET SEQ.)

(1176.) SEC. 47. Every railway corporation shall, in addition to the powers herein before conferred, have power.

First. To cause such examination and survey for its proposed railway to be made, *as may be necessary to the selection of the most advantageous route;* and for such purpose by its officers, agents or servants to enter upon the lands or water of any person but subject to liability for all damages which shall be done thereto.

Second. To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railway; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only, *and to purchase and hold with power to convey real estate for the purpose of aiding in the construction maintenance and accommodation of its railway.*

CHARTER OF UNION PACIFIC RAILWAY COMPANY—SOUTHERN BRANCH.

STATE OF KANSAS, }
OFFICE OF SECRETARY OF STATE. }

I, E. B. ALLEN, Secretary of State of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original instrument of writing filed in my office September 25, 1865.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 30 day of Aug., 1886.

[SEAL.] E. B. ALLEN,
Secretary of State.

We, whose names are hereunto subscribed, viz.: Robert McBratney, James R. McClure, and S. M. Strickler, of Davis county; T. S. Huffaker, M. Conn, G. M. Simcock, R. B. Lockwood, of Morris county; E. Goddard, R. H. Abraham, P. B. Maxson, J. H. Watson, G. R. Harper, Peter Harvey, M. M. Baker, of Lynn county; John T. Cox, H. Kelley, F. W. Tetter, S. S. Prouty, I. B. Scott, A. V. Coffin, of Coffey county; N. S. Goss, Isaac W. Dow, and James Crane, of Woodson county, do hereby associate ourselves together as a railroad company, under the act of the Legislature of the state of Kansas, entitled "An "act to provide for the incorporation of railroad "companies," approved Feb. the 13th, A. D. 1865, to be known as the "Union Pacific Railway Company, Southern Branch."

The object of this association shall be the construction of a railway, commencing at or near Fort Riley, or the junction of the Republican and Smoky Hill forks of the Kansas river, and on the line of the Union Pacific Railway, E. D., running thence, via Clarks Creek and the Neosho river, to a point at or near where the southern boundary line

of the state of Kansas crosses the said Neosho river.

The ultimate object of this association being to secure the construction of a continuous line of railway from the points above named, via the Arkansas and Red River to the city of New Orleans, in the state of Louisiana.

The capital stock of this association shall be one million of dollars, divided into shares of one hundred dollars each.

IN TESTIMONY WHEREOF, we hereunto subscribe our names.

R. McBRATNEY,	J. R. McCLURE,
S. M. STRICKLER,	T. S. HUFFAKER,
M. CONN,	G. M. SIMCOCK,
R. B. LOCKWOOD,	E. GODDARD,
R. H. ABRAHAM,	P. B. MAXSON,
J. H. WATSON,	G. R. HARPER,
PETER HARVEY,	M. M. BAKER,
JOHN T. COX,	H. KELLEY,
F. W. TETTER,	S. S. PROUTY,
A. V. COFFIN,	I. B. SCOTT,
N. S. GOSS,	ISAAC W. DOW,

JAMES CRANE.

STATE OF KANSAS, } ss.
COFFEY COUNTY. }

Before me, as notary public in and for the county and state aforesaid, personally appeared A. V. Coffin, I. B. Scott and H. Kelley, three of the subscribers to the foregoing statement of association, to me personally known, who being sworn in due form of law, on oath say that the foregoing is a true statement of the association entered into by the parties whose names are thereto subscribed and for the purposes therein set forth.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and official seal, this 20th day of Sept., A. D. 1865.

[SEAL.] JOHN T. COX,
Notary Public Coffey County, Kansas.

ASSIGNMENT BY A., T. & S. F. R. CO. TO U. P. RLY. CO., SOUTHERN BRANCH.

THIS INDENTURE, Made this 19th day of March, A. D. 1866, by and between the Atchison, Topeka & Santa Fe Railroad Company, party of the first part, and the Union Pacific Railway Company, Southern Branch, party of the second part, both corporations created and organized under and by virtue of the laws of the state of Kansas:

WITNESSETH, That whereas, by act of Congress entitled "An act for a grant of lands to the state of "Kansas in alternate sections, to aid in the con- "struction of certain railroads and telegraphs in "said state," approved March 3, 1863, lands were granted to said state in aid of the construction (among other roads and branches) of a railroad from where the main line of road of the party of the first part crosses the Neosho river, down said river to where the Leavenworth, Lawrence & Fort Gibson Railroad enters said Neosho valley; and *Whereas*, by the act of Congress entitled "An act making an "additional grant of land to the state of Kansas to "aid in the construction of railroad and telegraph "lines," approved July the 1st, 1864, an additional grant of lands was made to the state of Kansas, to aid in the construction of a railroad and telegraph line from Emporia via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad in said state; and *Whereas*, the Legislature of the state of Kansas, by its act entitled "An act to "accept a grant of lands made to the state of Kan- "sas, by the Congress of the United States, to aid "in the construction of certain railroads and tele- "graphs in said state, and to apply the same in the "construction of such railroads and telegraphs," approved February 9th, 1864, did accept the grant of lands so made by Congress; and *Whereas*, the legislature of said state by said act did agree to grant, bargain and sell to the party of the first part

hereto, in consideration (among other things) that said party of the first part should construct a railroad from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, down the Neosho river to the point where the Leavenworth, Lawrence and Fort Gibson railroad enters the said Neosho valley, said road to be constructed as in said act of the legislature, and the above recited acts of Congress specifically provided, and did agree, on the completion of sections of said road as therein provided, to convey by patent to the party of the first part hereto, all the lands granted as aforesaid by Congress, and applicable to the construction of the road last above mentioned ; and *Whereas*, the party of the first part did, within six months after the passage of the above recited act of the legislature of the state of Kansas, file their acceptance of the provisions of the above recited act, and did thereby convenant and agree with the state of Kansas (among other things), covenant that they would construct the road herein indicated, and do and perform all and singular the conditions and requirements in said acts of said legislature and of Congress contained, and *Whereas*, the party of the second part has since that time become a body corporate and politic, created and organized for the purpose of constructing a railroad from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, to the southern boundary of the state of Kansas, by way of the Neosho valley, *and on the route of road contemplated in said acts of Congress, and said legislature;* and *Whereas*, the legislature of the state of Kansas has made to the said party of the second part, a large appropriation to aid in the construction of the line of road last above mentioned ; and *Whereas*, the great length of the main line of road of the party of the first part, must delay the speedy construction of the road in the valley of the Neosho River ; and *Whereas*, the public good requires that there should be no conflict of rights in the construction of the road in said valley : THEREFORE, for and in consideration of one dollar

to them in the hand paid, the receipt whereof is hereby acknowledged, and in further consideration of the premises, covenants, undertakings and agreements of the party of the second part hereinafter contained and set forth, to be by said party kept, performed and observed, the party of the first part hath bargained, sold and assigned, and by these presents doth bargain, sell and assign and transfer, deliver over to the party of the second part, their representatives and assigns, all the rights, titles and interests, franchises, authority, privileges, immunities and liabilities, held, acquired, possessed and enjoyed, for constructing, maintaining, operating and enjoying a railroad from the Union Pacific Railroad, Eastern Division, from a point at or near Fort Riley, down the Neosho valley to where the Leavenworth, Lawrence and Fort Gibson Railroad may enter the Neosho valley; which rights, titles interests, franchises, authorities, immunities and liberties accrued to and became vested in the parties of the first part by virtue of its acceptance of the provisions of the act of the legislature of the state of Kansas above recited, and its promise, covenant, undertaking and agreement to do and perform all and singular the requirements and conditions of said act of said legislature and the acts of Congress hereinbefore recited and referred to, and in compliance by the party of the second part with the terms, requirements and conditions of the above recited acts, the party of the first part authorize and empower the party of the second part to receive, hold and enjoy any lands, property or effects applicable to the construction of a railroad between the points aforesaid, as fully and completely as the party of the first part might have held and enjoyed such lands, property and effects had this assignment or transfer never been made.

In Consideration of the Premises, And the further consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the party of the second part, their

legal representatives and assigns, further agrees covenant and promise with and to the party of the first part, their successors, legal representatives and assigns, that they will and faithfully do and perform all and singular the duties, obligations and requirements imposed upon said party of the first part, and assumed and undertaken by said party under the several acts of Congress and of the state of Kansas heretofore cited and hereby referred to as more fully setting forth the obligations and liabilities hereby assumed, and that they will construct maintain and operate a railroad and telegraph from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, down the Neosho river valley to where the Leavenworth, Lawrence and Fort Gibson Railroad may enter said valley, within the time required, and on the terms and conditions prescribed in said acts; and the party of the second part further agree, covenant and promise the party of the first part that the will protect and hold free from harm or loss in property or estate, the party of the first part against all forfeitures or penalties incurred or adjudged against said last named party in consequence of any default or failure made or permitted after the date hereof in the construction, maintenance or operation of said road or telegraph embraced in this agreement; and the said party of the second part further agree that they will repay any and all moneys necessarily expended up to the date of these presents for engineer's survey, plat and profiles by the party of the first part, upon the above named line of railroad, on the delivery to them of said engineer's maps plats and profiles upon which such expenditures were made.

In Testimony Whereof, The parties hereunto have subscribed their names and affixed their seals, by order of the respective board of directors.

On behalf of the Atchison, Topeka & Santa Fe Railroad Company,

SAMUEL C. POMEROY [SEAL],
President.

[SEAL.] WILLIS GAYLORD [SEAL],
Secretary.

In behalf of the Union Pacific Railway, Southern Branch,

R. McBRATNEY [L. S.],

N. S. Goss [L. S.],
Agents and Attorneys.

[The latter company has no seal.]

I, R. A. Barker, Secretary of State, do hereby certify that the foregoing is a true and correct copy of the original on file in this office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the great seal of the state, this 15th day of January, A. D. 1867.

[SEAL.] R. A. BARKER,
Secretary of State.

LAND GRANT ACT OF CONGRESS OF JULY 26, 1866.

CHAP. CCLXX.—AN ACT GRANTING LANDS TO THE STATE OF KANSAS TO AID IN THE CONSTRUCTION OF A SOUTHERN BRANCH OF THE UNION PACIFIC RAILWAY AND TELEGRAPH, FROM FORT RILEY, KANSAS, TO FORT SMITH, ARKANSAS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the state of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the state of Kansas, with a view to an extension of the same through a portion of the Indian territory to Fort Smith, Arkansas, there is hereby granted to the state of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to

the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the state of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right-of-way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less then double the minimum price of public lands when sold: *Provided*, That actual *bona fide* settlers under the preemption laws of the United States may, after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided also*, That settlers under provisions of the homestead act, who make their settlement after the passage of this act, and comply with the terms and requirements of said act, shall be entitled, within the said limits ot ten miles to patents for an amount not exceeding eighty acres each

SEC. 3. *And be it further enacted*, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies and public stores upon its road for the government of the United States, free from all cost or charge therefor to the government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the state of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said secretary shall in like manner issue to said company patents for the land for each of said sections of road, as in the first instance, until said road shall be completed; *Provided*, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

SEC. 4. *And be it further enacted*, That as soon as said company shall file with the Secretary of the Interior, maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported on said road and under the direction of the Postoffice Depart-

ment at such price as Congress may by law provide: *Provided*, That until such price is fixed by law the Postmaster-general shall have power to fix the compensation.

SEC. 6. *And be it further enacted*, That the right-of-way through the public lands be and the same is hereby granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables and water stations.

SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said company, duly executed, pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

SEC. 8. *And be it further enacted*, That the said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the state of Arkansas; and the right-of-way through said Indian territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops,

machine-shops, switches, side-tracks, turn-tables and water-stations.

SEC. 9. *And be it further enacted,* That the same grant(s) of lands through said Indian territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided,* That said lands become a part of the public lands of the United States.

SEC. 10. *And be it further enacted,* That said Pacific Railroad Company, Southern Branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes by such nation or tribe, or which such parties may have acquired under the laws of the United States.

SEC. 11. *And be it further enacted,* That any railroad company chartered under any law of the United States, or of any state which may have been heretofore or shall hereafter be organized by any act of the Congress of the United States, may connect, unite and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand river, upon just, fair and equitable terms, to be agreed upon between the parties, as shall not be against the public interest or the interest of the United States.

Approved July 26, 1866.

ACCEPTANCE OF ACT OF JULY 26, 1866, BY M., K. & T. RLY. CO.

To the Secretary of the Interior Department,
Washington, D. C.:

Sir:—This is to certify that at a legally convened meeting of the directors of the Union Pacific Railway (Southern Branch) Company, the same being a corporation originally chartered under the laws of the state of Kansas, at Emporia, Lyon county, Kansas, on the 8th day of August, A. D. 1866, the following resolutions were adopted: *Resolved*, That the terms, conditions and impositions of a bill granting lands to the state of Kansas to aid in the construction of the Southern Branch of the Union Pacific Railway and telegraph, from Ft. Riley, Kansas, to Ft. Smith, Arkansas, passed by Congress 24th day of July, A. D. 1866, and approved by the President 26th day of July, A. D. 1866, be and the same are hereby accepted by the said Union Pacific Railway (Southern Branch) Company; and *Resolved*, That a copy of this resolution, properly authenticated, be forwarded to the Secretary of the Interior.

Given under our hands and the corporate seal of the Union Pacific Railway (Southern Branch) Company, at Emporia, Lyon County, Kansas, this sixth (6th) day of December, A. D. 1866.

N. S. Goss,
Pres. U. P. Rly. (Southern Branch) Co.

P. B. Maxson,
Sec. U. P. Rly. (Southern Branch) Co.

SEAL.
UNION PACIFIC RAILWAY,
INCORPORATED SEPT. 25, 1865.
SOUTHERN BRANCH.

Endorsed:

"Union Pacific, Southern Branch, Emporia, Kans.," December 6, 1866. P. B. MAXSON. Resolution of the board of directors of the U. P. R. R., S. B., accepting the act of Congress approved July 24, 1866. Ack. Jany. 4, 1867.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Jan., 1867.

SIR: I have to acknowledge the receipt on the 26th ulto. of a certified copy of a resolution of the directors of the Union Pacific Railway (Southern Branch) Company, accepting "the terms, conditions and impositions of a bill granting lands to the state of Kansas to aid in the construction of the Southern Branch of the Union Pacific Railway and telegraph from Ft. Riley, Kansas, to Ft. Smith, Arkansas, passed by Congress 24th day of July, A. D. 1866, and approved by the President 26th day of July, 1866.

I am, sir, very respectfully your obedient servant, O. H. BROWNING, *Secretary.*

To P. B. MAXSON, ESQ., *Secretary of the Union, Pacific Railway (S. B.) Co., Emporia, Kansas.*

[To the foregoing was attached the certificate of the Secretary of the Interior, authenticating them as true copies of original on file and on record in that department.]

RESOLUTION CHANGING NAME OF U. P. (S. B.) RLY. CO. TO M., K. & T. RLY. CO.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

LEVI PARSONS, President of the Missouri, Kansas and Texas Railway Co., (late Union Pacific Railway Company, Southern Branch,) being duly sworn, deposes and says:

That at a meeting of the stockholders of the said Union Pacific Railway Company, Southern

Branch, held at Emporia, Kansas, on the third day of February, 1870, at which meeting a majority of the stock of said company was present, it was voted that the name of said Union Pacific Railway Company, Southern Branch, be changed, and made "Missouri, Kansas and Texas Railway Company."

LEVI PARSONS, *President.*

Subscribed and sworn to before me, this 26th day of March, 1870.

WM. H. RUSSELL,
Commissioner for Kansas, in the City, County and State of New York.

I, Thomas Moonlight, Secretary of State, state of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument filed in my office March 31, A. D. 1870.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused to be fixed the great seal of the state.

Done at Topeka, this 31st day of March, A. D. 1870.

[SEAL.] THOMAS MOONLIGHT,
Secretary of State, State of Kansas.

ACT OF THE LEGISLATURE OF KANSAS RATIFYING ASSIGNMENT.

CHAPTER CII.—RAILROADS.

RESOLUTION ratifying the transfer of certain railroad lands.

Resolved, by the Legislature of the State of Kansas:

That the transfer and assignment of the Atchison, Topeka & Santa Fé Railroad Company, made and executed on the 19th day of March, A. D. 1866, to the Union Pacific Railway Company, Southern Branch,

of all the rights, titles, interests, authority, privileges, immunities and liberties, held, acquired, possessed and enjoyed, for constructing, maintaining, operating and enjoying a railroad from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, down the Neosho valley to where the Leavenworth, Lawrence & Fort Gibson Railroad may intersect the Neosho valley, be, and the same is hereby ratified and confirmed: *Provided*, The term franchise, as used in the said transfer and assignment, shall not be construed to impair in any way the charter of said Atchison, Topeka & Santa Fé Railroad Company.

Approved February 26, 1867.

S. J. CRAWFORD, *Governor*.

ACT OF CONGRESS OF JULY 26, 1876.

CHAP. 227.—AN ACT TO DECLARE FORFEITED TO THE UNITED STATES CERTAIN LANDS GRANTED TO THE STATE OF KANSAS IN AID OF THE CONSTRUCTION OF RAILROADS, BY ACT OF CONGRESS APPROVED MARCH THIRD, EIGHTEEN HUNDRED AND SIXTY-THREE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands which were granted by act of Congress, approved March third, eighteen hundred and sixty-three, to the state of Kansas to aid in the construction of a railroad, commencing at Leavenworth, Kansas, and running, by way of the town of Lawrence and the Ohio City crossing of the Osage River, to the southern line of the state, in the direction of Galveston Bay, in Texas, with a branch from Lawrence, by the Valley of the Wakarusa River, to a point on the Atchison, Topeka & Santa Fé Railroad, where said road intersects the Neosho

river, and which have not been patented to said railroad company by the United States under said grant or earned by the completion of said road and to which said company are not lawfully entitled, are hereby declared forfeited to the United States, and shall hereafter be subject to entry only under the provisions of the homestead laws of the United States.

Approved, July 24, 1876.

The lands in controversy are situated along the line of railroad down the Neosho Valley, and fall within the indemnity limits of the grants of March 3d, 1863, and July 26th, 1866.

The grants of 1863 and 1864 were made to the state of Kansas, and by the state in the first instance conferred upon the A., T. & S. F. R. Co., and afterwards transferred by said company, *with the assent of the state*, to the Union Pacific, Southern Branch. See assignment (*ante*, p. 22) and ratification thereof (*ante*, p. 34.) The grant of 1866 was to the state, but for the express purpose of aiding said Union Pacific Railroad Company, Southern Branch, to construct and operate its railroad from Fort Riley down the valley of the Neosho river (*ante*, p. 27).

The lands were also within the indemnity limits of so much of the act of 1863, as provided for the construction of the line known as the Leavenworth, Lawrence & Galveston Railroad. The lands applicable to this line were conferred upon the Leavenworth, Lawrence & Fort Gibson Railroad Company (*ante*, p. 10); and that company and its successor made some claim thereto, and joined with the M., K. & T. in selecting these lands as indemnity. (See

record, top page 35.) It also released its supposed claim in favor of the M., K. & T. (*Ibid*, page 46.)

There was a question as to whether the L. L. & G. ever earned any part of the indemnity lands now in question, by constructing its line within the time required, and the unearned and unpatented portion of its grant was forfeited by act of Congress of July 26, 1876 (*ante* p. 32.) *Nothing is here claimed under the grant to that company*, and the claim of appellant rests upon:

1. The grant made by the acts of 1863 and 1864, to aid in the construction of the Neosho Valley Branch road.

2. The grant of 1866, to aid in the construction of substantially the same line, and

3. The statutes of Kansas, and the acts, proceedings and conveyances made in pursuance of said acts of Congress.

For the convenience of the Court a map is herewith submitted, showing the several lines of railroad, to which reference must be made, the Neosho river, the lands in controversy, and other points and places named in said grants.

1. The Union Pacific Southern Branch Company filed its map of definite location on the 3d of December, 1866 (Record, page 58–59), which was duly sworn to by the chief engineer of the company, certified by the President and chief engineer, and by the Governor of the state of Kansas; said affidavit and certificates being endorsed upon said map, as follows:

STATE OF KANSAS, }
COUNTY OF SHAWNEE, } ss.

G. M. WALKER, of Lawrence, in Douglas county and state of Kansas, being duly sworn, deposes and says that he is the chief engineer of the Union Pacific Railway Company, Southern Branch, and has been such chief engineer since the 1st day of September, 1865; and that as said chief engineer did survey and mark upon the ground the line or route of the said railway from Junction City, near Fort Riley, Kansas, to Council Grove, Kansas, at the times respectively designated by dates, which are included between flagstaffs upon and along the route of said railway, as delineated on this map; that from Council Grove to Emporia the line or route of said railway was surveyed by O. B. Gunn, chief engineer of the Atchison, Topeka & Santa Fé Railroad Company, in December, 1865, the field notes of which have not yet been received by deponent, but he has possession of the map of said survey; that said engineer of the Union Pacific Railway, Southern Branch, made from the 24th to the 28th day of September, 1866, inclusive, made an examination and fixed route of said railway from Emporia to the northern boundary of the Osage Indian reservation near Humbolt, Kansas.

G. M. WALKER,
Chief Engineer.

Sworn and subscribed this 17th day of November, 1866, before me,

T. R. MILLS,
[SEAL.] *Notary Public.*

OFFICE OF THE UNION PACIFIC RAILROAD COMPANY,
SOUTHERN BRANCH, ASSIGNEES OF THE ATCHISON,
TOPEKA & SANTA FE RAILROAD COMPANY,

November 17, 1866.

It is hereby certified, that in pursuance of the act of the legislative Assembly of the state of Kan-

sas, approved February 9, A. D. 1864, entitled, "An "act to accept a grant of lands made to the state of "Kansas by the Congress of the United States, to aid "in the construction of certain railroads and tele- "graphs in said state, and to apply the same to con- "struction of such roads and telegraphs." This map shows, in connection with the public surveys, the actual surveyed line of route of "the Union Pacific "Railroad, Southern Branch, from Junction City, "near Fort Riley, in the state of Kansas, to the "northern boundary line of the Osage Indian reservation, at or near the town of Humboldt," as per affidavit of the chief engineer of said railroad, as definitely fixed in compliance with the act of Congress, approved March 3, A. D. 1863, and in pursuance of the resolution of the board of directors of said railroad company, passed August 10, A. D. 1866; and that the dates of the field work thereof are truly indicated along the line from station to station upon this map.

In Testimony Whereof, the Union Pacific Railroad Company, Southern Branch, has hereunto attached its corporate seal, and caused the same to be signed by the Vice President and Acting President and Chief Engineer, at Topeka, on the day and year first above written.

Andrew Akin,
Acting President.

[seal.] G. M. Walker,
Chief Engineer.

Attest: P. B. Maxson, per W. R. Hoeg,
Acting Secretary.

I, Samuel J. Crawford, Governor of the state of Kansas, do hereby certify that this plat or map of the Union Pacific Railroad, Southern Branch, has been duly filed in my office by the railroad company, who are the legal assignees of the Neosho Valley Branch of the Atchison, Topeka & Santa Fé Railroad Company, and shows in connection with the public surveys the location of the line or route as actually surveyed of the Union Pacific

Railroad, Southern Branch, from Junction City, near Fort Riley, in the state of Kansas, to the northern boundary line of the Osage Indian reservation, at or near the town of Humboldt, as definitely fixed in compliance with the act of Congress approved March 3, A. D. 1863, entitled "An act for a grant of "lands to the state of Kansas in alternate sections, "to aid in the construction of certain railroads and "telegraphs in said state," with the act of the Legislative Assembly of the state of Kansas, approved February 9, A. D. 1864, entitled "An act to accept a "grant of lands made to the state of Kansas by the "Congress of the United States, to aid in the con-"struction of certain railroads and telegraphs in said "state, and to apply the same to construction of such "roads and telegraphs, granting certain lands to the "said road herein named."

IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused to be affixed the great seal of the state of Kansas.

Done at Topeka, this 17th day of November, A. D. 1866. S. J. CRAWFORD,
[SEAL.] *Governor.*
Attest: R. A. BARKER,
Secretary of State.

[The diagram and map showing the definite location of Union Pacific Railway, Southern Branch, and upon which the foregoing certificates were, was filed wth the Secretary of the Interor, December 3, 1866, as shown by annexed certificate of the Commissioner of the General Land Office. Record p. 58.]

2. The Union Pacific Southern Branch Company *claimed under all the acts*, as will be seen by reference to the following letter, filed with, and as explanatory of, said map of definite location. (Record, p. 60.)

WASHINGTON, D. C., January 3, 1867.

HON. O. H. BROWNING, SECRETARY OF THE INTERIOR:

SIR:—The map of the definite location of the line of the Union Pacific Railway, Southern Branch,

from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage lands, was forwarded to you 17th November, 1866, from Topeka by the Governor of Kansas, and received at your office November the 26th, 1866, but for some unaccountable reason, without a letter of transmittal. Hon. R. McBratney's attention having been called to the fact, filed a letter of transmittal under date of 26 November, 1866, which contains errors and omissions which the company desire to correct.

We therefore respectfully request that this letter be placed on file, *as declaratory of the purposes for which the said company presented and filed said map.*

The map was filed to show the line of said road as definitely located by said company, from Junction City at or near Fort Riley, Kansas, to the Northern boundary of the Osage reservation. An additional map will be filed as soon as the surveys of the line are completed from said northern boundary of the Osage Indian reservation to the southern boundary of the state of Kansas.

In presenting the map heretofore filed, as above stated, the company do not wish to be regarded as precluded by such location of the line from making any reasonable changes hereafter, when the road is being constructed, which further examination of the route shall dictate as expedient, nor as being subject by reason of such changes to a loss of any part of the lands granted.

We desire further to say that we claim on behalf of said company all the grants for the construction of a railroad on any part of said line, made to the state of Kansas, by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka & Santa Fe Railroad Company, to which they were granted by the state by an act approved February 9, 1864, accepting said grants, and that we also claim all the lands granted to the state of Kansas for the Union Pacific Railway (Southern

Branch) Company by the act of Congress, approved 26 July, 1866.

In behalf of said Union Pacific Railway (Southern Branch) Company, we therefore respectfully request that the lands granted by said acts between Junction City and the northern boundary of the said Osage Indian reservation, within the limits prescribed in said acts, from the line of the road as designated in said plat, be reserved from sale until the lands of said company be selected.

Very respectfully your obedient servants,

N. S. Goss, *President and Att'y,*
JOHN T. COX, *Agent and Att'y,*
U. P. R. W., S. B., Co.

3. The secretary of the Interior recognized the right of said company, under the act of 1866, as undoubted, and stated his purpose to recognize its rights under the acts of 1863 and 1864, upon the filing of due proof of the assignment from the A., T. & S. F. This appears by the following letter in reply to the foregoing. (Record, p. 61):

LETTER OF O. H. BROWNING, SECRETARY OF INTERIOR, JANUARY 7, 1867.

CERTIFIED TO BY SECRETARY OF INTERIOR.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., January 7, 1867.

SIR:—I have received the joint letter of yourself and J. T. Cox, Esq., dated the 3d instant, requesting that it be placed on file as declaratory of the purposes for which the Union Pacific Railway (Southern Branch) Company presented and filed a map of the definite location of the line of said road

from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage lands.

You state that you "claim on behalf of said "company all the grants for the construction of a "railroad on any part of said line, made to the state "of Kansas by the acts of Congress, approved "March 3, 1863, and July 1, 1864, said lands having "been assigned to it by the Atchison, Topeka & "Santa Fé Railroad Company, to which they were "granted by the state by an act approved February "9, 1864, accepting said grants," and also all the lands granted to the state of Kansas for the Union Pacific Railway (Southern Branch) Company by the act of Congress, approved July 26, 1866.

While this department doubt not the rights of the Union Pacific Railway (Southern Branch) Company under the latter act, it can not recognize said company as entitled to the benefits of the acts of Congress, approved March 3d, 1863, and July 1st, 1864, until it shall have established by due proofs a title to all the rights and interest vested under said acts in the Atchison, Topeka & Santa Fé Railroad Company.

The map, however, will be filed, and appropriate action taken in regard to it under the act of Congress, approved July 26, 1866.

I am, sir, very respectfully your obedient servant,

O. H. BROWNING,
Secretary.

N. S. Goss, Esq.,
President Union Pacific Railway (S. B.) Co.

Care Jno. T. Cox, Esq., Senate P. O., Washington, D. C.

4. In pursuance of this request, the U. P., Southern Branch, Company, forwarded to the Secretary of the Interior a certified copy of the transfer and assignment from the A., T. & S. F. Company to it, and of the act of the legislature of Kansas, ratifying the same. (See Record, p. 62.)

5. Under date of March 19, 1867, the commissioner of the General Land Office, under the direction of the Secretary of the Interior, forwarded to the register and receiver, at Humboldt, Kansas, a letter enclosing a diagram of the route of the Union Pacific, Southern Branch, road, and directing the withdrawal of "all the odd numbered sections "within the ten mile limits, and all the vacant lands "between the ten and twenty mile limits." (Record, p. 63.)

This order was made under and in pursuance of the act of 1866, alone; no reference being made to any other act. This was in pursuance of the order of the Secretary of the Interior found in his letter to Goss, of January 7, 1867, above copied, which order was as follows:

"The map, however, will be filed and appro-"priate action taken in regard to it, under the act "of Congress of July 26, 1866."

It was at that time the purpose of the department to proceed under the act of 1866, for the reason that no proof of the assignment from the A., T. & S. F. of its rights under the act of 1863, had been filed. Subsequently this proof having been filed, as shown above, the mode of proceeding was changed, as appears in the next following item of proof.

6. Proof of the assignment having been filed in the Interior Department, the entire subject of the administration of these several grants came before the Secretary of the Interior, and was by him, after careful consideration, disposed of in a formal opinion, as follows: (Rec. p. 65.)

DECISION OF SECRETARY OF INTERIOR.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 25, 1867.

SIR: Under date of the 19th ultimo I sent to you a map of the Union Pacific Railway, Southern Branch, showing the route of said road in Kansas, from Junction City down the Neosho valley to the northern boundary of the Osage lands.

A grant of land was made to the state of Kansas to aid in the construction of this road, July 26, 1866. (Stat. 1866, page 289.)

By acts of Congress, approved March 3, 1863, and July 1, 1864, grants of land were made to the said state to aid in the construction of certain other railroads. By said act of 1863 one of these roads and its branch, the Atchison, Topeka, & Santa Fé Railroad, is from Atchison via Topeka, and (as amended by act of 1864) Emporia, to the western line of the state in the direction of Fort Union and Santa Fé, New Mexico, *and the branch, from where the main line crosses the Neosho (at Emporia) downthe Neosho valley, to where the road from Lavenworth and Lawrence enters said valley.*

The said act of 1864 is for a railroad from Emporia to Junction City.

The ground from Emporia southwardly is covered bythe grants of 1863 and 1866, and from that point northwardly by the grants of 1864 and 1866.

N. S. Goss, Esq., President of the said Union Pacific Railway Company, Southern Branch, claims on behalf of said company, "*all the grants for the construction of a railroad on any part of said line made to the state of Kansas by the acts of Congress, approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka & Santa Fe Railroad Company, to which they were granted by the state by an act approved February 9, 1864, accepting said grants,*" *as well as the land granted by the said act of July 26, 1866.* A certified copy of that assign-

ment, also a certified copy of resolution No. 6 of the legislature of Kansas, approved February 26, 1867, ratifying the same, have been filed by Mr. Goss.

The grant to the state of Kansas by the said acts of 1863 and 1864 is the alternate odd numbered sections for ten sections in width on each side of the roads and branches, with the right of indemnity for lands disposed of, from odd sections outside of ten and within twenty miles of the same, provided, "that any and all lands heretofore reserved to the "United States, by an act of Congress, or in any "other manner by competent authority, for the pur- "pose of aiding in any object of internal improve- "ment, or for any other purpose whatsoever, be and "the same are hereby reserved to the United States "from the operation of this act," except when it is found necessary to locate the routes through such reserved lands: in that case the right-of-way is granted, subject to the approval of the President of the United States.

The lands thus granted are subject to the disposal of the Legislature, for the purpose of aiding in the construction of the railroads exclusively, "and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act provided," which is that the state may sell 120 sections before any road is built, and thereafter 120 sections upon the completion of every twenty miles, "provided that if any part of said roads and branches is not completed within ten years from the passage of this act, no further sales shall be made, and the lands unsold shall revert to the United States."

The grant to Kansas by said act of July 26, 1866, is for alternate odd numbered sections to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile, with right of indemnity outside of ten and within twenty miles from both the odd and even sections, provided that any and all lands reserved to the United States by any act of Congress

or in any other manner by competent authority, for the purpose of aiding in any object of *internal improvement* or other purpose *whatever* are reserved and excepted from the act, except the right-of way of 200 feet in width through such reserved lands subject to the approval of the President of the United States.

This grant of lands is declared to be made upon the condition that said company, after its construction, shall keep it in repair and use, and shall at all times transport United States troops, supplies and public stores, free from all cost or charge therefor to the government, and the granted lands are to inure to the benefit of said company upon the Governor of Kansas certifying to the completion of any section of ten consecutive miles of road, the lands within the limits of such completed section and coterminous with the same are to be patented to the company. *Upon said company filing with the Secretary of the Interior maps of its line designating the route thereof, it is made his duty to withdraw from market the lands granted in such manner as to effect the purpose of the act and subserve the public interest.* The right-of-way through the public lands is granted to said company, its successors and assigns, to the extent of 200 feet where the same may pass through the public domain, also all necessary ground for station houses, workshops, &c., with the right to take from the public lands adjacent to the line of said road material for the construction thereof.

The acceptance by said company of the terms and conditions of the grant, duly executed, has been filed.

The said railroad company is also authorized to extend and construct its railroad from the southern boundary of Kansas through the Indian Territory, upon certain conditions.

The state of Kansas will, upon complying with the terms, conditions and stipulations of said acts of March 3, 1863, and July 1, 1864, become entitled to the lands granted by said acts. To enable the state to do so, the land may be withdrawn for that purpose, and

you will issue the necessary instructions to the land officers of Kansas, if such instructions have not already been issued.

In virtue of said assignment and the ratification thereof by the legislature of the state of Kansas, the lands inuring to the state under said grants of 1863 and 1864, will be adjusted to the state for the benefit of said Union Pacific Railway (Southern Branch) Company upon the principles heretofore established and now in force, and then if any lands remain to the United States of odd sections within the limits of twenty miles on each side of the railroad, between the termini mentioned, the said Union Pacific Railway (Southern Branch) Company will become entitled to patents for such odd sections, and also for such even sections as remain to the United States outside the ten and within twenty miles of the road, upon complying with all the terms, conditions and stipulations of said act of July 26, 1866.

If the even sections of land remaining to the United States outside of the ten and within the twenty miles have not been withdrawn, you will issue the necessary instructions to the land officers in Kansas, withdrawing the same.

The map of definite location of the route of said railroad, now on file in your office, will become the basis of adjustment of the grants under said acts.

The certified copies of assignment, and act of the legislature referred to, are herewith to be placed on the files of your office.

You will send a copy of this letter to the Governor of Kansas.

Very respectfully your obedient servant,

O. H BROWNING, *Secretary.*

Hon. JOS. S. WILSON,
Commissioner of the General Land Office.

7. Upon the announcement of the foregoing decision, the Union Pacific, Southern Branch, Company proceeded to construct the railroad from Junction City, near Fort Riley, down the valley of the

Neosho river to the southern boundary of the state of Kansas, and on the 25th day of July, 1870, a map showing the completed line between said points was filed with the Secretary of the Interior, accompanied by a sworn statement of the chief engineer of the company (the name of which has been changed to the Mo., Kas. & Tex. Railway Company), and also by a certificate of the Governor of Kansas, that the line had been completed and equipped, as required by the acts of 1863, 1864 and 1866. (See Record, pp. 51, 52.)

The letter of the Secretary, transmitting this map to the Commissioner of the General Land Office, the affidavit of the chief engineer and the certificate of the Governor, are as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 25, 1870.

SIR:—I transmit herewith, for filing, a map showing the completed portion of the line of the road of the Missouri, Kansas & Texas Railway Company, from Junction City to the southern boundary of the state of Kansas, attached to which is a certificate of the Governor of said state, that that portion of the said road had been constructed and equipped, as required by the act of Congress granting lands to aid in its construction.

Very respectfully your obedient servant,

J. D. COX, *Secretary*.

THE COMMISSIONER OF THE
GENERAL LAND OFFICE.

STATE OF KANSAS, }
COUNTY OF DAVIS, } ss.

O. B. Gunn, of Junction City, in said county and state, being duly sworn, deposes and says that he is

the chief engineer of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas & Texas Railway Company, and has been such engineer since November 1, 1869; that the line on this map, commencing at Junction City, at or near the center of section twelve (12,) in township twelve (12) south, of range five (5) east, and terminating at the southern line of the state of Kansas, at a point three thousand five hundred and ten (3,510) feet east of the twenty-seventh (27th) milepost or mound, and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile post or mound on said southern line of the state of Kansas, shows the line of the route of said road in connection with the lines of the public surveys; that the road between those points has been completed and equipped as required by law.

O. B. GUNN, *Chief Engineer.*

Sworn and subscribed this 9th day of July, 1870, before me.

[SEAL.] THOMAS HOOKEY, *Notary Public.*

It is hereby certified that O. B. Gunn is the chief engineer of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas & Texas Railway Company, and that the location of the road, as represented on this map, is correct, and approved by the company; and also that the said portion of the said road has been completed and equipped in all respects as required by law.

LEVI PARSONS, *President.*

Attest; H. B. HENSON, *Secretary.*

EXECUTIVE OFFICE,
TOPEKA, KANSAS, July 13, 1870.

I, James M. Harvey, Governor of the state of Kansas, do hereby certify that this map and profile of the Union Pacific Railway Company, Southern

Branch, now known as the Missouri, Kansas & Texas Railway Company, has been filed in my office by the said railway company, and shows that portion of the said railroad commencing at Junction City, at or near the center of section 12, town 12 south, range 5 east, and ending southern line of the state of Kansas, at three thousand five hundred and ten (3,510) feet east of the 27th milepost, and one thousand seven hundred and eighty-four (1,784) feet west of the twenty sixth (26th) milepost, on said southern line of the state of Kansas, *which has been completed and equipped, as required by the acts of Congress granting lands to the state and to the said railroad company, approved March 3, 1863, July 1, 1864, and July 26, 1866, and the act of the legislative assembly of the state of Kansas, approved February 9, 1864, entitled "An act to accept a grant of lands made to the state of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said state, and to apply the same to construction of such roads and telegraphs."*

IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused to be affixed the great seal of the state.

Done at Topeka, this 13th day of July, 1870.

[SEAL.] JAMES M. HARVEY,
Governor.

Attest: THOMAS MOONLIGHT,
Secretary of State.

[To the foregoing was attached the map, certified to by the Commissioner of the General Land Office, showing the route of the Missouri, Kansas & Texas Railway, from Junction City to the southern line of Kansas, and certificates of General Land Office, authenticating the foregoing letters, etc. For particulars reference is made to said map. Record, pp. 52-53.]

8. Proof of the completion of the line having thus been made according to law, the company proceeded, in conjunction with the proper officials of the land office, and in strict accordance with the regulations of the Secretary of the Interior, to

make selection of indemnity lands. The selection was made as follows:

1. The M., K. & T., successor to the U. P., Southern Branch, and the L., L. & G. (the latter joining evidently as a measure of precaution, to save any question), jointly selected the indemnity lands, including those in controversy in this suit. This selection was made by both companies, under the act of 1863, and by the M., K. & T. under the act of 1863, and also under that of 1866, and a list of the lands selected was sworn to by the land commissioners of the two companies; was certified to by the register and the receiver of the proper land office, and together with the relinquishment of the L., L. & G., it was duly filed with the commissioner of the General Land Office. All this appears by the record pages 35 to 46.

Particular attention is invited to the fact that this selection, by and for the M., K. & T., was made under both the grants of 1863 and 1866. (Record, p. 35.) That the selection was made in strict accordance with the general orders of the Secretary of the Interior regulating such selections, appears by reference to circular No. 15, of the General Land Office, of January 24, 1867, with the approval of the Secretary, which is in evidence. (Record, pages 91 to 98.)

9. The list of lands thus regularly selected *under all the acts*, as indemnity lands, were on the 7th of April, 1873, duly certified by the Commissioner of the General Land Office, with the approval

of the Secretary of the Interior and transmitted to the Governor of Kansas.

We copy from the record as follows:

LIST OF LANDS AND CERTIFICATE OF COMMISSIONER OF GENERAL LAND OFFICE.

MISSOURI, KANSAS & TEXAS RAILROAD—KANSAS.

List of lands in the district of lands subject to sale at Topeka and Independence, within the twenty mile limits, granted to the state of Kansas by the act of Congress, approved the 3d of March, 1863, entitled "An act for a grant of lands to the state of "Kansas, in alternate sections, to aid in the con-"struction of certain railroads and telegraphs in "said state," designated by odd numbers for ten sections in width on each side of said railroad, which the United States had not sold or to which the right of preëmption or homestead had not attached.

SOUTH OF BASE LINE AND EAST OF SIXTH PRINCIPAL MERIDIAN, KANSAS—MISSOURI, KANSAS & TEXAS RAILROAD LIST—INDEPENDENCE DISTRICT.

Twenty Mile Limits.

[Here follows description of lands, including those in controversy.]

RECAPITULATION.

Topeka district	3,386.51 acres.
Independence district	24,345.99 "
Total	27,732.50 acres.

CERTIFICATE OF COMMISSIONER GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, April 7, 1873.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the forego-

ing, on pages one to seven, inclusive, is a correct and true list of the tracts of land within the twenty mile limits, granted to the state of Kansas by the act of Congress, approved March 3, 1863, entitled "An act for a grant of lands to the state of Kansas, "in alternate sections, to aid in the construction of "certain railroads and telegraphs in said state," being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for ten sections in width on each side of the Missouri, Kansas & Texas Railroad, in Kansas.

And it is further shown by letter of the Secretary of the Interier to the Commissioner of the General Land Office, dated July 25, 1870, and the map therewith, duly certified by the Governor of the state of Kansas, that the said Missouri, Kansas & Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the state of Kansas.

And they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of the said act of March 3, 1863, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first hereinabove written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, April 10, 1873.

Approved, subject to the conditions above mentioned.

C. DELANO, *Secretary.*

(See Record, pp. 52 to 58.)

LIST OF LANDS WITH THE RELINQUISHMENT OF THE L. L. & G. RLD. CO. TO M. K. & T. RLY. CO.

INDEPENDENCE DISTRICT, LIST 3.

(Here follows description of lands in controversy in this case ; total acreage, 24,345.99.)

For the purpose of partition, the Leavenworth, Lawrence & Galveston R. R. Company, by the hand of its President and over the seal of the company, hereby relinquish all their right, title and interest in and to the afore-described lands (embraced in Independence Joint Indemnity List No. 3,) to the Missouri, Kansas & Texas Railway Company, their successors and assigns ; and request that patents therefor may issue to said Missouri, Kansas & Texas Railway Company.

IN WITNESS WHEREOF, the Leavenworth, Lawrence & Galveston R. R. Co. have, as aforesaid, signed and sealed at Chicago, in the State of Illinois, this thirteenth day of December, A. D., 1872.

[SEAL.] J. M. WALKER,
President.

(To the foregoing was attached the certificate of the Commissioner of the General Land Office, authenticating it as a "copy of a list of lands, with the "relinquishment of the Leavenworth, Lawrence & "Galveston Railroad Company," dated December 13, 1872, the original being on file in that office.) Record, pp. 42 to 46.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, April 10, 1873.

Approved, subject to the conditions above mentioned.

C. DELANO, *Secretary.*

(See Record, pp. 52 to 58.)

LETTER FROM THE LAND OFFICE TO THE GOVERNOR OF KANSAS, FORWARDING CERTIFIED LIST.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 12, 1873.

HON. THOS. A. OSBORN, GOVERNOR OF KANSAS, TOPEKA, KANSAS:

SIR:—Herewith I have the honor to transmit exemplified copy of approved list No. 5, embracing 3,386.51 acres, selected in the Topeka district, and 24,345.99 acres in the Independence district, total 27,732.50 acres, as lands inuring under the act of March 3, 1863, to the state of Kansas, for the benefit of "Missouri, Kansas & Texas Railroad Company."

The list was returned by you in conformity with our letter of 18th ulto., for correction in certificate, under the act of March 3, 1863, which has been properly made.

Please acknowledge its receipt.

I am, sir, very respectfully,

WILLIS DRUMMOND, *Commissioner.*

(See Record, p. 68.)

10. The lands selected and certified to the state of Kansas, as aforesaid, were on the 19th day of May, 1873, duly conveyed by said state to the beneficiary, the Missouri, Kansas & Texas Railway Company. (See patent set out as Exhibit "D," to complainant's bill. Record, p. 10.)

11. The said Missouri, Kansas & Texas Company conveyed the same lands to the Leavenworth, Lawrence & Galveston Railroad Company, by deed dated October 9th, 1871, and by deed of further as-

surance dated February 28th, 1872. (See Exhibits "E" and "F" to complainant's bill. Record, pp. 12 to 16.)

12. The respondent in this case is the successor of the said Leavenworth, Lawrence & Galveston Company—so averred in the bill. (Record, p. 6.)

13. The bill avers that the M., K. & T. has received the full grant of land donated to it by the act of July 26, 1866. (Record, page 5.) This allegation is distinctly denied by the answer. (Record, p. 20.)

The complainant offered no proof to sustain this allegation, but the respondent (though not obliged to do so), has disproved it. (See Record, pp. 98, 99, 100.) The map shows the distance from Junction City to the northern boundary of the Osage Indian reservation (at which point the grant terminated under the decision of this court in the Osage reservation case, 92, U. S. 733), was about 128 miles. The grant of 1866 gave ten sections per mile, five on *each* side, or say 819,200 acres. The amount received was 712,000, or 107,200 acres less than a full grant. And this estimate *includes* the 27,000 acres in controversy in this suit.

14. The question of the proper point of junction between the M., K. & T. and the L., L. & G. (which is made in this case), was raised in the Land Department, pending the administration of the grant of 1863–4, and was submitted upon full argument

to the Commissioner of the General Land Office. The decision of the Commissioner deals with that, and one other question. We quote from it so much as relates to the question of route, and the proper point of junction. (Record, p. 71.)

DECISION OF GENERAL LAND OFFICE, SEPTEMBER 15, 1870.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, Sept. 15, 1870.

MESSRS. T. A. & C. EWING, ATTORNEYS, LEAVENWORTH, LAWRENCE & GALVESTON R. R. CO., WASHINGTON CITY:

GENTLEMEN:—I have received and considered your argument in the matter of the conflicting claims of the Leavenworth, Lawrence & Galveston Railroad Company and the Union Pacific Railroad Company, Southern Branch, to certain lands in the granted and indemnity limits of said roads.

First, with reference to the lands north of the Osage ceded lands.

You argue that the Southern Branch Road claims under the act of 26th July, 1866, for a railroad from Fort Riley to Fort Smith, and also as assignees of the Atchison, Topeka & Santa Fé Railroad Company, under the act of 3d March, 1863, for a railroad from the point where the Atchison, Topeka & Santa Fé Railroad crosses the Neosho, down said Neosho valley to the point where the Leavenworth, Lawrence & Galveston Road enters the said Neosho valley; but that they cannot claim under both acts, as that would be a double grant, and that they have no right under said act of 1863, but

are restricted to the act of July, 1866; that the grant to your road under the act of 3d March, 1863, is three years prior to the grant of 1866 to the Southern Branch Road, and hence, that said company have no claims as against the Leavenworth, Lawrence and Galveston Company to any of the lands in conflict north of the Osage Indian lands.

With the question of the right of the Southern Branch Company, as assignees of the Atchison, Topeka & Santa Fé Company, to the grant of lands under the act of 3d March, 1863, for the railroad from where the said Atchison, Topeka & Santa Fé road crosses the Neosho river, to the point where the Leavenworth, Lawrence & Galveston road enters the Neosho valley, we are not now competent to deal, the matter having been determined, so far as concerns this office, by the decision of the department of March, 1867, in which, after due deliberation, the secretary fully recognizes the right of said company under that act, and indicates the principle upon which the grant shall be adjusted; *nor does he in that decision recognize a double grant to said company, but states that, in virtue of the assignment to the Southern Branch road, the lands inuring to the state under the grant of 1863 and 1864 will be adjusted to the state for the benefit of the South Branch Company, and then if any lands remain to the United States within the limit of twenty miles of the road, the South Branch Company will be entitled to patent for such odd sections, and also such even sections as remain to the United States outside of the ten and within twenty miles of the road, &c.*

By the specific terms of adjustment we are required to charge the grant of 1866 with all the lands on odd sections which may be found vacant and inuring under the grant of 1863, and then make up to it any deficiency out of the unappropriated odd or even sections within the indemnity limits; the only advantage inuring to the company by the act of 1866 being the more liberal promise made for indemnity.

The question then left for determination is: What is the extent of the grant under the act of 3d March, 1863, for the branch line down the Neosho valley?

This branch is, by the statute, to run from where the Atchison, Topeka & Santa Fé Road crosses the Neosho river, "down said Neosho valley to the "point where the Leavenworth, Lawrence & Gal- "veston Road enters the said Neosho valley."

The southern limit, then, of the grant is the point where the road represented by you enters the Neosho valley; where now is that point? Your argument asserts that you might, "with a fair show of reason, "insist that where the the line of the Leavenworth, "Lawrence & Galveston Road crosses the summit "(or in western phrase 'the divide') between the "Osage and the Neosho, it enters the valley of the "Neosho, but you think the better interpretation "is, that where the line first touches the level land "bordering the river, there is the point where it "enters the Neosho valley," and where the branch coming down the valley from Emporia must join it; and which is a point adjacent to the town of Iola.

To give to the indefinite terminus of the grant a definite location, it will be proper to ascertain the intent of Congress in making the grant, and the views of the state, as the grantee, in the acceptance.

Congress granted to the state land for—

1. A road running from Leavenworth via Lawrence southward through the state, in the direction of Galveston Bay, in Texas.

2. For a road from Atchison via Topeka to the western boundary of the state, with a branch from where it should cross the Neosho, down said Neosho valley to where the first named road enters the said Neosho valley.

The purpose of Congress in these grants was to assist in the construction of one main stem running southwest from Atchison, one running from Leavenworth and

Lawrence, and a branch line connecting the two; the point of union of the branch with the main stem from Atchison is definitely fixed at or near Emporia; that on the main stem from Lawrence is at the point where said road from Lawrence "enters the Neosho valley;" the evident object of this branch line was to give to western Kansas a short route to and from southern Kansas and the south. And with this object in view the line of route was designated as running down the valley of the Neosho, as required by the act, to the north boundary of the Osage Indian lands; *now, to give to the expression "Neosho valley" the broad interpretation advanced by you, would be to require this branch to leave the Neosho river, and seek your road for a junction, at a point ten, fifteen, or perhaps twenty miles from the river, and upon a route that could be of little if any benefit to the state or its people; or else, while building its road down the Neosho valley, to obtain a grant for only that part of the road north of a line due east and west from the point claimed by you as the point where your road enters the valley, and which would deprive said branch road of a grant for a large portion of its road, while Congress evidently intended that, for each mile of road built, the same quantity of land should be given as was granted to the other roads and branches provided for in the same act.*

Further: By referring to the act granting lands to aid in the construction of the Kansas & Neosho Valley road from the Union Pacific road, Eastern Division, southwardly through the eastern tier of counties in Kansas, with a view of its extension so as to affect a junction at Red river with a railroad then being constructed in Texas, and giving in certain contingencies the right-of-way through the Indian Territory, we find by the eleventh section of the act it is provided, that after the railroad shall be located to the valley of the Neosho river, any other railroad company duly chartered might connect, unite and consolidate with it upon equitable terms, &c.

We have here a similar expression as that used in the act of 1863, which has been given a definite

interpretation by the Honorable Secretary of the Interior in his very able argument of the 21st of May last, to His Excellency, the President, on the relative right of the Kansas & Neosho Valley, Leavenworth, Lawrence & Galveston and the Union Pacific (South Branch) Railroad Companies, to build a road through the Indian Territory.

The Secretary expresses clearly the opinion that the law requires the road which should first reach the boundary to do so at the point where the Neosho river crosses said boundary, and though the line of the Kansas & Neosho Valley Road strikes the boundary about ten miles east of river crossing, and according to the interpretation given by you in your argument, may, for all the purposes of the act, be in the valley of the Neosho, yet the Secretary finds that the point where the said Kansas & Neosho Railroad Company has touched the southern boundary of Kansas, and the northern boundary of the Indian Territory, is not one reasonably within the meaning and purpose of the general scheme which "he has found to have been fixed by the legis-"lation and treaties referred to," and determines that the said road is not authorized at present under said legislation to enter the Indian Territory and build the trunk line aforesaid, and that to complete its rights at this time, to do so, it would have been necessary for said road to have been completely constructed to a point in the Neosho valley at or near the crossing of the boundary line by the Neosho. These findings were approved by the President. Again, in the acceptance of the grants of 1863 by the state, under the legislative act of the 9th of February, 1864, it is declared "that at "the point of intersection of said roads and branches "there shall be an equal division of the lands grant-"ed to aid in building said roads and branches," thus reorganizing the right of the branch to the grant at the point of intersection.

It is thus evident that in the use of the term "Ne-"osho valley," Congress and the state had in view the lowest portion of the valley, or that part nearest to the

river available for railroad purposes, and that the point where the first-named road enters the Neosho valley "is "the point where it reaches or crosses the river, and "that the grant of 1863 for the branch road would "reach to this point." The point of crossing, however, is within the limits of the lands ceded under the first article of the Osage Indian treaty of September 29, 1865, and as the act of 1863 evidently did not contemplate giving any lands within an Indian reservation, the grant to the Atchison branch, as well as the Leavenworth, Lawrence & Galveston road, under that act must stop at the boundary of said reserve; but to that point, it is our opinion that the branch line is entitled to lands on equal terms with the Leavenworth, Lawrence & Galveston road. * * * * * *

This opinion is, of course, open to an appeal therefrom to the Honorable Secretary of the Interior, and thirty days are allowed within which to file such appeal.

Very respectfully,
Jos. S. Wilson, *Commissioner.*

15. The general merits of this controversy were again presented to the Interior Department in 1878, and were then again passed upon, as appears by the following opinions. (Record, pages 84 to 88.)

LETTER OF HON. CARL SCHURZ, SECRETARY OF THE INTERIOR, TO HON. D. C. HASKELL.

Department of the Interior,
Washington, D. C., 15 May, 1878.

Hon. D. C. Haskell, House of Representatives:

Sir:—In reply to your letter of the 11th ultimo, concerning certain lands within the overlapping

limits of the Missouri, Kansas & Texas Railroad, and the Leavenworth, Lawrence & Galveston Railroad, in the county of Allen, state of Kansas, which have been patented to the former company, I have the honor to transmit herewith a copy of a report of the Commissioner of the General Land Office, dated the 2nd inst., relative to the subject matter of your inquiry.

In addition to what is contained in the commissioner's report, and in order that you may fully understand the status of the lands within the overlapping limits of said roads, I deem it proper to state that the grant of odd sections of land to the state of Kansas to aid in the construction of the roads, of which the above mentioned are successors, was made by an act of Congress, approved March 3, 1863. (12 Stats., page 772.) As the two grants were made by the same act, it is evident, I think, that neither company acquired priority over the other by virtue of the granting act. The withdrawal of odd sections of lands falling within the twenty mile limits of both roads was made by letter of the commissioner of the General Land Office, dated March 19, 1863, received at the local office May 5, 1863. As this was a simultaneous withdrawal, neither company acquired precedence over the other thereby, to the lands lying within the overlapping limits.

This grant and withdrawal operated upon and reserved the odd sections of land only, and the rights of the grantees were, in all respects, equal as to the lands lying within said limits.

On August 8, 1872, said lands were selected by both roads, as per joint list No. 3.

Subsequently, and on December 13, 1872, the Leavenworth, Lawrence & Galveston Railroad Company relinquished all claim to said lands, and they were thereafter patented to the Missouri, Kansas & Texas Railroad Company, as stated by the commissioner.

As the Missouri, Kansas & Texas road was entitled to indemnity for lands lost in place, to the full amount of the lands so selected, and as the selections

were made of lands which had been reserved for indemnity purposes for said road, I am of opinion that there is no defect in the title of the railroad company.

After the Missouri, Kansas & Texas road became possessed of the fee simple title to the lands, it had the right to convey the same to the Leavenworth, Lawrence & Galveston road; and if the conveyance was *bona fide*, the title of the latter road thereto is perfect. The act of Congress, approved July 24, 1876, declaring a forfeiture of the lands granted to aid in the construction of the Leavenworth, Lawrence & Galveston Railroad, except such as had been earned by the construction of said road (19 Statutes, 101,) did not declare a forfeiture of the lands granted to aid in the construction of roads of which the Missouri, Kansas & Texas is the successor, and hence did not affect the status of the lands falling within the indemnity limits of the latter company in Allen county. By act of Congress, approved July 26, 1866, the Union Pacific Railroad Company, Southern Branch, now the Missouri, Kansas & Texas Railroad Company, was granted indemnity from any of the public lands of the United States, odd or even sections, within its twenty mile limits, for odd sections lost in place for any of the reasons mentioned in the act. The even sections (being then reserved) were withdrawn for the benefit of said road by letter of the Commissioner of the General Land Office, dated March 19, 1867, received at the local office April 3, 1867. So much of said lands as the road was entitled to has been patented, as stated by the Commissioner.

After careful examination of the question presented by your letter, and the accompanying brief and argument, I am of opinion that there is no defect in the title of the Missouri, Kansas & Texas Railroad Company to the odd and even sections of the land lying within the overlapping limits of said roads, and that nothing would be gained by attacking the outstanding patents in the courts.

Very respectfully,

C. SCHURZ, *Secretary.*

LETTER OF J. A. WILLIAMSON, COMMISSIONER OF GENERAL LAND OFFICE, TO HON. CARL SCHURZ.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 2, 1878.

HON. CARL SCHURZ, SECRETARY OF THE INTERIOR,
WASHINGTON, D. C.:

SIR:—I have the honor to acknowledge the receipt, by reference, of a letter addressed to you by Hon. D. C. Haskell, M. C., dated April 11, 1877.

I am directed to make report to you.

Mr. Haskell states that a large number of settlers upon lands in Allen county, Kansas, now claimed by the Leavenworth, Lawrence & Galveston Railway Company, call in question the validity of its title, and for that reason decline to purchase from it; that said company claims title to a portion of the land through a grant from the Missouri, Kansas & Texas Railway Company, under patent to it from the United States; that the Missouri, Kansas & Texas Railway Company claims to be the legal successor to the Union Pacific Railroad Company, Southern Branch, and the grants for and to that company by acts of Congress, approved March 3, 1863, and July 26, 1866; that the grants to the Missouri, Kansas & Texas, and to the Leavenworth, Lawrence & Galveston Companies, conflict as to lands in Allen county; that by an amicable arrangement, each company took certain tracts on parcels of land, and in settlement deeded to each other so much as secured an equitable divison; that the settlers claim that patents to the companies to much of the land were wrongfully issued, and that the title thereto should be yet in the United States, and they (the settlers) be allowed to enter them as in the case of other lands belonging to the United States; that, if there is any possible defect in the title to these lands,

he (Mr. Haskell) shall be anxious to have a suit brought in the United States Courts, to test the question ; and he asks that the matter be investigated, to the end that all the facts may be developed, and the proper remedy applied, if, in your judgment, there is any defect in the title by which either company claims lands situated in Allen county.

While the letter from Mr. Haskell would seem to ask an investigation and opinion concerning all the lands in Allen county claimed by either of the companies named, it has been ascertained from conversation with him since the date of his letter, that the lands to which his inquiry is intended to refer, are those within the conflicting and overlapping lines, designating the twenty mile or "indemnity" limits of either grant.

These lands, so far as Allen county is concerned, are in townships 24 S, 20 E ; 25 S, 20 and 21 E ; and 26 S, 20 and 21 E.

An examination shows that the even sections in the described limits and townships, to which title has passed from the United States, were selected by the Missouri, Kansas & Texas Railway Company, on August 10, 1872, under the act of July 26th, 1866 (which act only provided for such indemnity by even sections). The selections were certified by the register and receiver at Independence, April 14, 1873 ; were embraced in approved list No. 12, dated October 16th, 1873, and patent issued to the company November 3d, 1873, as provided in said act of July 23d, 1866.

The odd sections in described limits and townships, to which title has passed from the United States, were selected by the Missouri, Kansas & Texas Railway Company, and the Leavenworth, Lawrence & Galveston Railroad Company (under act of March 3d, 1863, as to the latter company, by which alone, if at all, it was entitled to any "indemnity" lands, and under the acts of March 3d, 1863, and July 26th, 1866, as to the former), on August 8, 1872 ; the selections were certified by the register and receiver

on the day they were made, and so submitted to this office, as "per joint list No. 3;" on December 17, 1872, there was filed in this office an instrument executed December 13, 1872, by the president of the Leavenworth, Lawrence & Galveston Railroad Company, and under its seal, which, for the purpose of partition, relinquished for their said company "all the right, title and interest in and to the aforesaid lands (embraced in Independence joint indemnity list No. 3,) to the Missouri, Kansas & Texas Railway Company, their successors and assigns, and request that patents therefor may issue to the said Missouri, Kansas & Texas Railway Company;" accordingly said lands were, on April 10, 1873, certified to the state of Kansas, as for the benefit of the Missouri, Kansas & Texas Railway Company, per approved list No. 8.

Thus, the only title from the United States to any of the lands in question has passed, either by patent direct to, or by a certification to the state for the benefit of the Missouri, Kansas & Texas Railway Company. So far as such patenting and certification are concerned, I am unable to discover any defect in the title.

Whether or not the Leavenworth, Lawrence & Galveston Railroad Company had any rights in the premises which they could have transferred, makes no difference, inasmuch as, under the acts of 1863 and 1866, and the absence of any conflicting claim, the Missouri, Kansas & Texas Railway Company would still have been entitled to all of said lands. I am therefore of opinion that they were legally and regularly patented or approved.

Mr. Haskell's letter does not set forth wherein it is claimed that the title from the United States was wrongfully issued, and in the absence of any specific allegation to that effect, I shall simply discuss the general question raised.

The grants to or for the Missouri, Kansas & Texas Railway Comyany have been thus far adjusted upon the assumption that, under the acts of 1863 and 1866, it was entitled to both odd and even sections within its "indemnity" limits, where the same con-

flicted with the "indemnity" limits of the Leavenworth, Lawrence & Galveston Railroad. I am of opinion that this was and is the proper construction of said acts, but I am unable to find that there has ever been any explicit decision by this office, or by the department, determining the rights of the former company as against the latter.

It was, however, acquiesced in by the latter, at least as far as the lands in Allen county are concerned. *The title passed from the United States under that construction, and without any opposition.*

It has been finally determined that the Leavenworth, Lawrence & Galveston Railroad Company is not entitled to any lands in its "indemnity" limits; but no question has been heretofore raised against the right of the Missouri, Kansas & Texas Company to the lands. That company has received title under an undisputed construction of law, and in my opinion all questions concerning such title are *res adjudicata;* and any attempt to disturb the title before either this department or Congress, would only tend, as I believe, to create uncertainty respecting the power of the companies to sell, and could only result in the complete confirmation of the title as it now rests.

As to the validity of any title to these lands in the Leavenworth, Lawrence & Galveston Company, either by deed from the Missouri, Kansas & Texas Railway Company, or by patent from the state of Kansas, in pursuance of the "adjustment" between the companies, I have simply to state that, in my opinion, that is a matter which calls for no action on the part of the government.

If the Missouri, Kansas & Texas Company has seen fit to bestow a portion of the lands upon the Leavenworth, Lawrence & Galveston Company, it is not within the province of the United States to interfere therewith, nor can the setting aside of such an arrangement benefit the settlers, for, as before stated, *if the title has not vested in the latter company under the partition, it certainly has inured to the Misssouri, Kansas & Texas Company under its grant.*

The letter from Mr. Haskell is herewith returned.

Very respectfully your obt. servant,

J. A. WILLIAMSON, *Commissioner.*

16. In 1882 the subject was again brought before the Interior Department, and the Commissioner of the General Land Office then made his report, found in the record, p. 78, upon which this suit was instituted. This report, as appears on its face, rested entirely upon the assumed validity of the order of withdrawal for the benefit of the L., L. & G., of March 19, 1863 (Exhibit "A," to bill, Record, p. 7), *which order has since been held void by this Court* (see *K. P. R. Co.* vs. *A., T. & S. F. R. Co.*, 112, U. S., 414).

ACT OF CONGRESS, OF AUG. 2, 1854, DECLARING THE EFFECT OF A CERTIFICATION OF LANDS GRANTED TO STATES AND TERRITORIES. REVISED STATUTES, SEC. 2449.

"SECTION 2449. Where lands have been, or "may hereafter be granted by any law of Congress, "to any one of the several states and territories, "and where such law does not convey the fee simple title of the lands, or require patents to be "issued therefor, the list of such lands, which have "been, or may hereafter be certified by the Commissioner of the General Land Office, under the "seal of his office, either as originals, or copies of "the originals, or records, shall be regarded as conveying the fee simple of all the lands embraced "in such lists, that are of the character contemplated by such act of Congress, and intended to "be granted thereby; but where such lands em-

"braced in such lists, are not of the character em-
"braced by such acts of Congress, and are not in-
"tended to be granted thereby, the lists, so far as
"these lands are concerned, shall be perfectly null
"and void, and no right, title, claim, or interest
"shall be conveyed thereby."

Upon the foregoing facts the Court below found for the complainant, and rendered decree in accordance with the prayer of the bill (Record, p. 99). The opinion of the Court, which is not in this record, is as follows: (See 25th Fed. Rep., page 243.)

BENJ. H. BREWSTER,
Att'y-gen'l, &c.
vs.
THE KANSAS CITY, LAWRENCE & SOUTHERN RAILROAD COMPANY.

This is a proceeding in equity to set aside the patent to a body of land in southern Kansas. There can be no question of the right of the government to maintain such a suit when either the ministerial officers have issued a patent for lands not subject to a patent or not within the scope of the grants made by Congress (*United States* vs. *Stone*, 2 Wall. 525; *Leavenworth, L. & G. R. Co.* vs. *United States*, 92 U. S., 740); or when such officers have been imposed upon by false and fraudulent representations. (*United States* vs. *Minor*, 114 U. S. 233, Sup. Ct. Rep. 836.) A case involving the title to the same lands was before the Supreme Court of Kansas when I was a member of that Court, and the conclusion then reached was adverse to the title of the defendant here. (*Neer* vs. *Williams*, 27 Kan., 1.) So far as any matters were considered by that Court I shall say nothing, but refer simply to the opinion I then wrote. I see no reason to doubt the correctness of the views

then expressed. That case was submitted upon an agreed statement of facts, *some of which are now not only not admitted, but vigorously and successfully disputed.* This change calls for an examination of certain questions not heretofore considered by me. In view, however, of the similarity in many respects, and also of the further fact that the magnitude of the interests involved will inevitably send this case to the court of last resort, I forbear any lengthy recital or discussion. I simply state very briefly the conclusions to which, upon the facts as they now appear, I have arrived.

The legal title must first be examined. That consists of a patent from the state of Kansas, dated May 19, 1873, based upon a certificate to the state from the Commissioner of the General Land Office. Both certificate and patent recite that the lands passed under the grant of March 3, 1863. Upon that act, therefore, rests the legal title. The beneficiaries of the two grants of that act were as named by the state, the Leavenworth, Lawrence & Galveston Railroad Company, and the Atchison, Topeka & Santa Fé Railroad Company. Of the first, nothing need be said, as nothing is claimed. To the second were granted lands for building a railroad from Atchison southwestwardly with a branch from its crossing of the Neosho, down the valley of the Neosho to the point where the Leavenworth, Lawrence & Galveston Railroad should enter the valley. In July, 1864, a further grant was made to the state to aid in the building of a road from Emporia, the Atchison, Topeka & Santa Fé crossing of the Neosho, northwestwardly to the Union Pacific Road at or near Fort Riley. And again, in July 1866, an act was passed by Congress granting directly to what is now known as the Missouri, Kansas & Texas Railroad Company, lands to aid in building a road from Fort Riley southeasterly, and down the Neosho valley to the southern boundary of the state of Kansas. The line of this road was, therefore, for part of its distance, substantially the same as that of the branch of the Atchison, Topeka & Santa Fé above referred to. In March, 1866, the Atchison, Topeka

& Santa Fé assigned its franchise and grant in respect to this branch to the Missouri, Kansas & Texas, and in January, 1867, this assignment was ratified by the state.

The Atchison, Topeka & Santa Fé never did anything toward building this branch, but the Missouri, Kansas & Texas constructed its entire road from Fort Riley down the Neosho valley. Could it claim any benefit of the grant to aid in building the branch? Generally speaking, I think it correct to say that when by separate acts at different sessions of Congress lands are granted to two different corporations or parties to aid in building lines of road, with the same general course or direction, by no arrangement between such corporations or parties, can the building of only one road secure the benefits of both grants. Unless an intent to the contrary is plainly disclosed by the language of one or the other of the acts of Congress, it will be presumed either that the latter grant superseded the former, or else that two roads must be built to earn the two grants. Such views accord with the rule that grants are to be construed in favor of the government and against the grantee, and also with the policy of the government to secure the public lands to actual settlers, except in those cases in which the importance of some public improvement justifies the public aid.

But beyond this general view and sustaining it, may be noticed these facts: The act of 1863 provides for a "branch" down the Neosho valley, and not an independent cross-road. Perhaps it would be giving undue importance to the word "branch" to hold that its use concludes the question, and yet it is certainly significant of the intent of Congress. Obviously that body contemplated a single trunk line running southwestwardly through the state, with a branch down the Neosho valley, all under one management and control. Again, the third proviso to the granting section in the act of 1863, reads: "Provided, also, that no part of the land "granted by this act shall be applied to aid in the "construction of any railroad or part thereof, for

"the construction of which any previous grant of "land or bonds may have been made by Congress." Now the date from which the term "previous" relates may be the date of the act itself, or the time at which the state should name the beneficiary, or it may well be the time of the actual construction of the road. A positive determination of the date intended is unnecessary. All that I notice it for is because it emphasizes the intent of Congress against the doubling of grants upon a single road. Still again, when the act of 1866 was before the Senate for consideration, reference was made to the grant of 1863, and the tenor of the discussion shows that it was understood that the proposed act was to supersede all other acts and to be the only living operative grant of lands to aid in building a road down the valley of the Neosho.

These are the principal considerations which impel to the conclusion that the Missouri, Kansas & Texas, by building its road down the Neosho valley, took nothing under the act of 1863. Of course this destroys the legal title, for the act of 1863 alone provided for certification to the state. But it is earnestly insisted that though the legal title may fail, yet equitably the Missouri, Kansas & Texas was entitled to the lands, and therefore equity will not interfere. Doubtless if the premise is true, the conclusion will follow. This presents to my mind the most difficult question in the case, and one upon which I have slowly and hesitatingly come to a conclusion. I premise this as the correct rule applicable to this branch of the case. When the legal title fails, the defendant may defeat the action by proof that the equitable title to the very lands is with it, but not by proof that it had an unadjusted equitable claim upon the government for an equal quantity of unselected lands.

The act of 1866, as heretofore stated, made a direct grant to the railroad company. It provided for patents from the government to it. It granted lands in place and provided for indemnity lands to be selected by the Secretary of the Interior. The

lands in controversy are not part of the lands in place, but are within the indemnity strip.

Were they ever selected as indemnity lands under the act of 1866? Respondent claims that they were, but the evidence does not satisfy me of the fact, but rather indicates the contrary. It is true, that in August, 1872, the Leavenworth, Lawrence & Galveston, and the Missouri, Kansas & Texas Companies filed a joint claim for these lands as indemnity lands, in which the former company claimed under the act of 1863 and the latter under both the acts of 1863 and 1866. But the Commissioner of the General Land Office recognized the claim as under the act of 1863 alone, and certified the lands to the state. This was done in April, 1873. But for the reasons given heretofore, I think the Missouri, Kansas & Texas Company had no valid, legal or equitable claim under the act of 1863. But it is said that under the act of 1866 it did have a valid claim, and that the mistake of the commissioner in naming the statute does not destroy equitable rights. But how can it be inferred that the Secretary of the Interior would have recognized any claim under the act of 1866, or recognizing it, made a selection of these lands in satisfaction thereof?

It does not seem to me that, under the testimony, it can be said that the Commissioner would or ought to have selected these lands. Indeed, I can not see how the company was entitled to so large a body of lands as was in fact patented and certified to it. Counsel say that it was entitled to 819,200 acres at least, and received title to only 712,000. It may be true that that is all to which it has received a good title; but beyond this, 270,970 acres of Osage ceded lands were patented or certified to it, and at the time of this application and selection, in 1872 and 1873, the title of the road thereto was, in the Interior Department at least, supposed to be perfect, for not until the October term, 1875, of the Supreme Court, was the title to these lands declared void, and of the 712,000 acres

to which it had a perfect title, no more than 86,000 acres were conveyed after such decision. So that whatever claim for lands the Company may now have, a claim which perhaps has recognized force only since the above decision, I do not think it can be said to have a valid, equitable title to these lands, and the Court may not take the place of the department and make a selection. As I said before, this part of the case presents the most doubtful and embarrassing question; but my conclusion is as above, and the decree must go as prayed for.

118-682

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Supreme Court of the United States,

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY,
Appellant,
v.
BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL OF THE UNITED STATES, FOR AND ON BEHALF OF THE UNITED STATES OF AMERICA.

NO. 749.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

GEO. W. McCRARY,
A. T. BRITTON,
JAMES HAGERMAN,
A. B. BROWNE,
Solicitors for Appellant.

KANSAS CITY:
FOOTE'S PANTAGRAPH PRINT, SHEIDLEY BUILDING, COR NINTH & MAIN.
1886.

Supreme Court of the United States,

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Appellant,
v.
BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL OF THE UNITED STATES, FOR AND ON BEHALF OF THE UNITED STATES OF AMERICA.
NO. 749.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

This is a bill in equity, filed by the Attorney-general in his own name, but alleged to be for and on behalf of the United States, in the Circuit Court

above named, on January 25, 1883, to vacate appellant's title to some 20,000 acres of land in Allen county, Kansas. Such lands were conveyed to the State of Kansas on April 19, 1873, upon the assumed authority of a grant, or grants, to said state for railroad purposes, and for the use and benefit of the Missouri, Kansas & Texas Railway Company through whom the appellant claims.

The case rests on bill, answer and documentary proofs. The decree below vacates such title.

For the convenience of the Court, a printed statement is submitted, marshaling in chronological order the Federal and State legislation, and executive and corporate action relating hereto.

STATEMENT.

FEDERAL AND STATE LEGISLATION.

1. By act of March 3d 1863, (12 Stats. 772, Statement, p. 6) Congress granted lands to the *State* (Sec. 1),

> "For the purpose of aiding in the construction.
> "First, of a railroad and telegraph from the
> "city of Leavenworth, by the way of the
> "town of Lawrence, and via the Ohio City
> "crossing of the Osage river, to the southern
> "line of the state, in the direction of Galveston
> "Bay, in Texas, with a branch from Lawrence,
> "by the valley of the Wakarusa river, to the

"point on the Atchison, Topeka & Santa Fé
"railroad, where said road intersects the Neo-
"sho river.

"Second, of a railroad from the city of Atch-
"ison via Topeka, the capital of said State,
"in the direction of Fort Union and Santa Fé,
"New Mexico, *with a branch from where this last*
"*named road crosses the Neosho, down said Neosho*
"*valley to the point where the first named road*
"*enters the said Neosho valley.*"

With the road last named "*down said Neosho "valley*," we are here principally concerned.

2. The grant was *in præsenti*, and to the State alone, Section 3 thereof prescribing

"That the said lands hereby granted to said State
"shall be subject to the disposal of the legisla-
"ture thereof, for the purpose aforesaid and no
"other."

Subject to subsequent identification of the particular tracts, all the lands were thus conveyed to the State in trust, to secure the construction of said roads, the sole limitation upon the State in her administration of the trust being expressed in the proviso to section 1, viz.:

"That the lands hereby granted for and on
"account of said roads and branches *severally*,
"shall be exclusively applied in the construc-
"tion of the same, and for no other purpose
"whatever, and shall be disposed of only as the
"work progresses through the same, as in this
"act hereinafter provided."

Section 4 provides as to manner of disposal, that on certification by the Governor to the Secretary of the Interior, of the construction of any section of twenty miles, and the latter being satisfied therewith, the State might cause to be sold all the *granted* lands opposite thereto, and on construction of the entire line, all the remaining lands within both granted and indemnity limits might be sold;

"Provided, That if any of said roads and branches
"is not completed within ten years from the
"passage of this act, no further sale shall be
"made and the lands unsold shall revert to the
"United States."

3. By act approved February 9, 1864 (Statement p. 15), the State accepted this grant. By section 2 thereof, it provided that on construction of the road and branches first named by the Leavenworth, Lawrence & Fort Gibson R. R. Co., "The State of Kansas hereby agrees to grant, bargain and sell" said company all the lands applicable thereto under the Congressional grant.

And by section 3, the act made offer of precisely similar agreement to the Atchison, Topeka & Santa Fé R. R. Co., for construction of the second road and branch, adding thereto the promise that if Congress should before March 4, 1866, extend the grant for the Neosho Valley road northward to an intersection with the Union Pacific Railroad, Eastern Division, at or near Fort Riley, the Atchison company should be entitled to earn same on the same terms and conditions therein prescribed.

4. The Atchison, Topeka & Santa Fé R. R. Co. was created by special act of the Kansas Territorial Legislature, February 11, 1859, (Statement, p. 4.) long prior to the Congressional grant.

By section 2 of said charter it was authorized to construct, maintain and operate a railroad.

"From or near Atchison, on the Missouri River,
"in Kansas Territory, to the town of Topeka,
"in Kansas Territory, and to such point on the
"southern or western boundary of the said Ter-
"ritory, in the direction of Santa Fé, in the
"Territory of New Mexico, as may be most
"convenient and suitable for the construction
"of such railroad; *and, also, to construct a*
"*branch of said railroad to any point on the*
"*southern boundary of said Territory of Kansas,*
"*in the direction of the Gulf of Mexico.*"

As an existing State corporation authorized to construct along the lines which Congress by the grant of 1863 had declared necessary for the public use, it became the agent of the State in such construction; the State in turn being co-contractor with the United States and undertaking to secure such construction.

5. July 21, 1864, the Atchison Company accepted the offer made by the State act of 1864 (*item 4 supra*), and thereby created an executory contract with respect to these land.

(Record 59, Statement 14.)

6. July 1, 1864 (13 Stats., p. 339, Statement, p. 15), Congress granted to the *State* lands in like amount, and upon the terms and conditions of the

grant of 1863, to aid the construction of a railroad

"From Emporia, via Council Grove, to a point
"near Fort Riley, on the Branch Union Pacific
"Railroad in said state."

Emporia is the point of crossing of the Neosho river by the Atchison road, and this grant to the State made operative the State's promise to that company in the State act of 1864, accepting the grant of 1863 (*item 3, supra*).

7. Sept. 10, 1865, the Union Pacific Railway Company, Southern Branch, was incorporated under the general incorporation law of the State, passed February 13, 1865. (Statement, pp. 16–20.) Its articles declared :

"The object of this Association shall be the
"construction of a railway, commencing at
"or near Fort Riley, or the junction of the
"Republican and Smoky Hill forks of the Kan-
"sas River, and on the line of the Union
"Pacific Railway E. D., running thence, via
"Clarke's Creek and the Neosho River, to a
"point at or near where the southern boundary
"of the State of Kansas crosses the said Neosho
"River.

"The ultimate object of this association being to
"secure the construction of a continuous line
"of railway from the points above named, *via*
"the Arkansas and Red Rivers, to the City of
"New Orleans in the State of Louisiana."

8. At this date, therefore (1865), two distinct corporations organized and existing under State laws, were each authorized to construct a road from Fort

Riley to the southern boundary of the State—and upon an identical route. One was aided by a Federal grant—the other not. Existing conditions did not justify such dual construction. One must give way to the other.

By its corporate act the Atchison Company projected a route westward to Santa Fé, in the direction of the Pacific, and another route southward therefrom "in the direction of the Gulf of Mexico." But Congress, in extending to the State the aid given by the Act of 1863—provided that the road from Leavenworth via Lawrence should receive aid to the southern State line—on the line projected "in the direction of Galveston Bay," and gave aid only in the construction of a road down the Neosho Valley to a connection with the road first named, as projected towards the Gulf. The hope of federal aid beyond that point for an extension of the Atchison line, "in the direction of the Gulf of Mexico" was thus foreclosed.

But the incorporation of the Union Pacific Railway, Southern Branch, projected a road from Fort Riley down the same Neosho Valley—with the expressed object of reaching the Mississippi Valley and finally the Gulf of Mexico at New Orleans. In other words, the Leavenworth, Lawrence and Galveston road was projected on a southwest route, and the other upon a southeast route.

9. By section 1 of its corporate act (Statement, p. 4), the Atchison Company was (Sec. 1) given the power

grant of 1863, to aid the construction of a railroad

"From Emporia, via Council Grove, to a point
"near Fort Riley, on the Branch Union Pacific
"Railroad in said state."

Emporia is the point of crossing of the Neosho river by the Atchison road, and this grant to the State made operative the State's promise to that company in the State act of 1864, accepting the grant of 1863 (*item 3, supra*).

7. Sept. 10, 1865, the Union Pacific Railway Company, Southern Branch, was incorporated under the general incorporation law of the State, passed February 13, 1865. (Statement, pp. 16–20.) Its articles declared:

"The object of this Association shall be the
"construction of a railway, commencing at
"or near Fort Riley, or the junction of the
"Republican and Smoky Hill forks of the Kan-
"sas River, and on the line of the Union
"Pacific Railway E. D., running thence, via
"Clarke's Creek and the Neosho River, to a
"point at or near where the southern boundary
"of the State of Kansas crosses the said Neosho
"River.

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9. By section 1 of its corporate act (Statement, p. 4), the Atchison Company was (Sec. 1) given the power

"Of acquiring, by purchase or otherwise, and "of holding and conveying real and personal "estate, which may be needful to carry into "effect fully the purposes and objects of this "act."

And by section 9 it was provided that the company

"May acquire by release, donation, or other- "wise, any lands; and may hold the same, or "convey to others, or use the same in any man- "ner deemed for the interests of said com- "pany."

Similarly the general incorporation law of 1865, section 15 (Statement, p. 18), under which the Union Pacific Company, Southern Branch, was organized, provided (section 15)

"Such company may acquire by purchase or gift, "any land in the vicinity of such road, or "through which the same may pass, so far as "may be deemed convenient or necessary by "said company to secure the right-of-way, or "such as may be granted to aid in the con- "struction of such roads, and the same to hold "or convey in such manner as the directors "may prescribe."

10. With the power to receive and to convey thus mutually existing in each company, the Atchison company agreed to transfer, and the Union Pacific Company, Southern Branch, agreed to accept, the former's interest under its contract with the State, as to the construction of this Neosho Valley road, and to construct the road as required by the granting acts.

The assignment (Record, p. 47, Statement, p. 22) was executed March 19, 1866. Its premise recites the granting acts, the franchise existing in both companies to construct a road from Fort Riley down the Neosho Valley, and adds:

"And Whereas, the great length of the main line "of road of the party of the first part must de- "lay the speedy construction of the road in the "valley of the Neosho River; and, Whereas, "The public good requires that there should be "no conflict of rights in the construction of the "road in said valley."

By this instrument the Atchison Company transfered the right

"To receive, hold and enjoy any lands, prop- "erty or effects applicable to the construc- "tion of a railroad between the points afore- "said, as fully and completely as the party of "the first part might have held and enjoyed "such lands, property and effects, had this as- "signment or transfer never been made."

In return, wherefor, the assignee company agreed to

"Construct, maintain and operate a railroad "and telegraph from a point on the Union "Pacific Railroad, eastern division, at or "near Fort Riley, down the Neosho river val- "ley to where the Leavenworth, Lawrence and "Fort Gibson railroad may enter said valley, "within the time required and on the terms "and conditions prescribed in said acts."

It will be borne in mind, however, that the authority of this assignee company to construct and

operate this road came from its charter under State law in 1865, and *not* from this assignment. (*Item 7 supra.*)

11. The Atchison company was the agent for the state alone in the performance of this work. Its power of substitution, if doubtful, was settled by the Act of the State Legislature, passed February 26, 1867 (Statement, p. 34), which "ratified and confirmed such assignment."

12. Following such assignment, and in direct recognition thereof, Congress enlarged and consolidated the grants of 1863 and 1864, by the grant of July 26, 1866 (14 Stats. p. 289, Statement, p. 27), for the direct use and benefit of this assignee Company. Such act declares

"That for the purpose of aiding the Union Pacific "Railroad Company, Southern Branch, the same "being a corporation organized under the laws "of the State of Kansas, to construct and oper- "ate a railroad from Fort Riley, Kansas, or "near said military reservation, thence down "the valley of the Neosho River to the south- "ern line of the State of Kansas with a view "to an extension of the same through a portion "of the Indian Territory, to Fort Smith, Ar- "kansas, there is hereby granted to the State "of Kansas, for the use and benefit of said "Railroad Company" lands in specified quantity, with rights of indemnity, etc. This Act required acceptance by the Company of its terms, etc., within one year thereafter and filing of same with Secretary of the Interior. This was done Dec. 26, 1866, and receipt acknowledged (Rec. 76–77).

Inasmuch as upon the construction of this grant of 1866 hinges much of this controversy, we here state that we claim thereunder,

1. That by it Congress recognized and ratified the assignment above recited.

2. That in letter and intent it brought the prior grants of 1863 and 1864 within the compass of this new and supplemental law.

3. That being so construed and administered by the Land Department and the State, and the Company having accepted the grant and fully complied with all its conditions on such basis, this Court will not disturb the executed consequences thereof.

EXECUTIVE ACTION.

13. March 19, 1863, prior to acceptance of the grant by the State, or the definite location of any road thereunder, the Commissioner of the General Land Office withdrew the lands within the granted or ten miles limits and according to "a diagram "showing the *probable* lines of said roads and branches," and upon the request of "the Senators and Representatives in Congress, from Kansas." (Rec. p. 7.)

14. December 3d, 1866, the Union Pacific Ry. Co., Southern Branch, filed with the Secretary of the Interior, map of definite location from Fort Riley to the north boundary of the Osage Indian lands, and including that portion of the line opposite the

land here in question, being the only map of location filed by either Company under either of the acts of 1863, 1864 or 1866. (Rec., p. 58, Statement, pp. 37–38.)

15. January 3, 1867, the president and attorney of the company advised the Secretary of its claim to all the lands granted by the acts of March 3d, 1863, and July 1st, 1864, under foregoing assignment, and also under the grant of July 26, 1866, requesting withdrawal of the lands so granted, in accordance with the map recently filed (Rec. p. 60, Statement, pp. 40–41).

16. January 7, 1867, the Secretary replied, declining to recognize the company's rights under the acts of 1863 and 1864, until proof of such assignment was furnished, but affirming its right under the act of 1866, and stating that map of definite location *supra* would be filed and acted on thereunder (Rec., p. 61, Statement, p. 42).

17. January 31, 1867, the company filed copy of such assignment and act of the Kansas Legislature ratifying same (Rec., 62).

18. Thereon and by formal decision of March 25, 1867, Mr. Secretary Browning held (Rec., 66–67, Statement, p. 45),

> "In virtue of said assignment and the ratification "thereof, by the legislature of the State of "Kansas, the lands enuring to the state under "said grants of 1863 and 1864, will be adjusted "to the State for the benefit of said Union Pa- "cific Railway (Southern Branch) Company, "upon the principles heretofore established,

"and now in force, and then, if any lands re-
"main to the United States of odd sections
"within the limits of twenty miles on each
"side of the railroad, between the termini men-
"tioned, the said Union Pacific Railway (South-
"ern Branch) Company will become entitled
"to patents for such odd sections, and also for
"such even sections as remain to the United
"States outside the ten and within twenty
"miles of the road, upon complying with all
"the terms, conditions and stipulations of said
"act of July 26, 1866.

19. March 19, 1867, by direction of the Secretary, and on the basis of this map of definite location, the Commissioner of the General Land Office withdrew the lands falling within the grant, viz.:

"All the odd numbered sections within the ten
"mile limits, and all the vacant lands between
"the ten and twenty mile limits."

(Rec., 63–64.)

20. April 30, 1867, and on the filing of map showing the definite location of the Leavenworth, Lawrence and Galveston Railroad, from Leavenworth via Lawrence to the Southern line of the State, the Commissioner of the General Land Office withdrew the odd sections falling within the ten miles (granted) and twenty miles (indemnity) limits thereof.

The lands here in suit fell within the ten mile (or granted) limits of the "probable" lines of route withdrawn by letter of March 19, 1863 (Rec., 7, *item* 13, *supra*), but on definite location of each road were

found to be within their overlapping indemnity limits and so finally withdrawn (*items* 19, 20 *supra*).

(Bill. Rec., p. 3; Answer, Rec., p. 18.)

21. February 3, 1870, the name of the Union Pacific Railway Company, Southern Branch, was changed to the Missouri, Kansas & Texas Railway Company. (Rec., p. 77; Statement, p. 33.)

22. July 25, 1870, said Company caused to be filed with the Secretary of the Interior map and accompanying certificate from the Governor of Kansas, showing completion of its entire line as required by the acts of 1863, 1864 and 1866, and State act of 1864. (Rec., 50, 52; Statement, pp. 49, 51.)

23. The Neosho Valley road extending under the grant of 1863 to the point where the Leavenworth, Lawrence & Galveston road enters said valley, necessarily produced overlapping grants, and conflict arose as to the proper terminus of the Neosho Valley grant. Such conflict was settled by decision of Land Commissioner Wilson, September 15, 1870, holding the point of intersection to be where the L. L. & G. road "reaches or crosses the river, "and that the grant of 1863 for the branch road "would reach to this point." This was at or near Chanute, but as such point was within the Osage Indian Reservation, he further held the grants under the act of 1863 must stop at the northern boundary of that reserve, and to such point both roads were entitled to lands on equal terms. Both

Companies acquiesced in this decision. (Rec., 71, 76; Statement, pp. 58–63.)

24. September 21, 1871, the Governor certified to the construction of the Leavenworth, Lawrence and Galveston Railroad from Lawrence to the southern boundary of the State (Rec., 32). Thus leaving unconstructed the road from Leavenworth to Lawrence, and the branch connected therewith. Neither has since been built, and the period therefor (10 years) prescribed by the grant of 1863, expired March 3d, 1873.

25. August 8, 1872, the Missouri, Kansas & Texas Company, and the Leavenworth, Lawrence & Galveston Company, jointly selected the lands in suit, the former Company claiming same in terms therein under both the grants of 1863 and 1866, and the latter under the grant of 1863 (Rec., 35).

26. With overlapping grants, wherein by decision of the General Land Office (Rec., 71, 76, *Item 23 supra*) each Company was entitled to an undivided half, partition was necessary. Amicable adjustment was made, mutual deeds interchanged, and thereunder the Leavenworth, Lawrence & Galveston Company received deeds for these tracts from the Missouri, Kansas & Texas Company on October 9, 1871 and February 28, 1872 (Rec., 12, 14).

Whilst by such partition *inter sese*, it was to receive these lands out of the Missouri, Kansas & Texas Co.'s grant, it was deemed necessary to make joint selection. Thereafter, and on December 13,

1872, the former Company relinquished on the record its interest therein as against the United States, and requested their conveyance to the Mo. Kans. & Texas Co. (Record, pp. 42–46; Statement, p. 55.)

27. Pursuant thereto, the lands were so certified to the State on April 19, 1873, as enuring under the grant of 1863 to the State for the use and benefit of of the Mo. Kans. & Texas Co. (Rec., pp. 52–58; Statement, 53–4.)

And May 19, 1873, they were patented by the State to that Company. (Exhibit D. to Bill, Record, p. 10.)

The present appellant is the lawful successor of the Leavenworth, Lawrence & Galveston Railroad Co., as affirmed by the bill and admitted by the answer. (Rec., pp. 3–17.)

It claims solely as grantee under the Mo., Kans. & Texas Co.'s title—the lands being charged on the records of the General Land Office wholly to the latter Company's grant, list No. 8, April 10, 1873. (Rec., 70.)

The essential facts, therefore, are:

(1) Grant of 1863 to the State.

(2) Appointment by State of agent to construct.

(3) Substitution of new agent with State's assent.

(4) Federal recognition of such new agent and enlarged grant of 1866 to aid construction.

(5) Full and seasonable construction of the road.

(6) Followed by due selection and conveyance of the lands.

Upon the foregoing facts, and at the instance of third parties having no privity with the source of legal title, and whose application to that end had been theretofore denied (Record, 83, 85), the Attorney-general ten years thereafter initiates this proceeding to annul the title thus created. The assumed right of recovery is based upon technical grounds. The case was argued for the Government below by private counsel (Decree, Record, p. 99).

In effect the Court below held:

1. That the grants of 1863 and 1866 were wholly distinct.

2. That the Neosho Valley Road had not been constructed under the grant of 1863, and hence the legal title asserted thereunder must fail.

3. That construction by the Missouri, Kansas & Texas Co., under the grant of 1866, and selection of the lands in suit by that Company under that grant did not give the equitable title, because the lands thus selected had never been "indicated" by the Secretary of the Interior as that act required.

ASSIGNMENT OF ERRORS.

The Circuit Court erred,

1. In holding that the road down the Neosho Valley provided for in the grant of 1863, was not constructed in precise accordance with all the requirements thereof and by the Company duly authorized to so construct.

2. In holding that the assignment from the Atchison, Topeka & Santa Fé Co. to the Union Pacific Co., Southern Branch, was from any cause invalid, and that the same was not lawfully ratified and confirmed by all necessary parties to the land grant.

3. In holding that by the grants of 1863 and 1866, construction of two roads down said Valley was essential to earn the lands granted under both acts.

4. In denying the legal title of appellant under the conveyances from the United States to the State of Kansas, and from said State to appellant's grantor—the Missouri, Kansas & Texas Railway Company—executed under the authority of said grant of 1863.

5. In denying the equitable title of appellant derived from selection of the lands in suit, by said

Missouri, Kansas & Texas Railway Company, under the grant of 1866, and in holding that said lands were not properly selected thereunder.

6. In entering decree in favor of the UNITED STATES, upon a bill filed in the name of the Attorney-general, praying decree vesting the legal title in that officer as the orator or actor in the cause.

7. In granting decree in favor of complainant, notwithstanding the bill charges no fraud, and sets out particularly none of the matters which the Court below held to constitute mistakes of law, nor in any manner makes out a case.

ARGUMENT.

I.

The road down the Neosho Valley was constructed in precise accordance with the grant of 1863.

In deciding *contra* the Court below holds,

1. That by the grant of 1863, Congress

"Contemplated a single trunk line running south-
"westerly through the State, with a branch
"down the Neosho valley, all under one man-
"agement or control."

2. That inferential aid may be given this view by the third proviso to the granting section of the act of 1863, which provides

"That no part of the land granted by this act shall
"be applied to aid in the construction of any
"railroad or part thereof, for the construction
"of which any previous grant of lands or bonds
"may have been made by Congress."

3. That from the debate in the Senate on the passage of the act of 1866,

"The tenor of the discussion shows, that it was
"understood that the proposed act was to su-
"persede all prior acts, and to be the only liv-
"ing operative grant of lands to aid in building
"a road down the valley of the Neosho." (Opinion, Statement, p. 71.)

Against such contention we submit,

There is no warrant in the act for the assumption that Congress intended to make provision for "the management or control" of the lines; the whole purpose of the act was to provide for the *construction* and not for the "management and control" thereof.

That this is the correct view of the act, and that the State was not bound to confer the grants for the main line and the branch upon one Company, is, we submit, clear, from the following, among other considerations:

(A)

Even if it were conceded that the several lines and branches described in the act, were intended to be connected and continuous lines when constructed, it would not follow that the State was bound to employ but a single agency in their construction. There is nothing in the act which required the State to confer the lands, or any of them, upon any company or individual. The State could have constructed the lines on its own account, and could have sold the lands to reimburse its treasury. The State was to see to it that the lines were constructed, and it was plainly provided by section 4, that "when the Governor of said State shall certify to the Secretary of the Interior, that *any* twenty consecutive miles of *either of said roads, or branches, is completed* in a good, substantial and workmanlike

manner, as a first-class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with this requirement, the said State may cause to be sold all the lands granted as aforesaid, situated opposite to, and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section of twenty miles, and no further." And the same provision is made with respect to each section of twenty miles.

Congress granted the lands to the State, and provided that the State might cause them to be sold as each section of twenty miles of the lines or branches should be completed. The Government was to be informed, and the Secretary of the Interior was to be satisfied, *of the fact of construction*, and then the lands could be sold by the State. The State was at liberty to employ a different agency to construct each section of twenty miles, or as above suggested, to construct the lines on its own account. All that Congress required was that the State should see to it that the lines, or the sections thereof, were constructed in the manner required, and should satisfy the Secretary of the Interior of the fact. It is, therefore, perfectly clear that the State was *not* bound to confer the grant for both main line and branch upon one and the same company.

(B)

But Congress did not provide that the line and branch should be under one and the same manage-

ment and control when constructed. There is nothing in the act of Congress respecting the subject of the management or control of the lines after construction. It is true, that the line down the Neosho Valley is designated in the act of 1863, as a branch of the main line from Atchison west (the A., T. & S. F.); but by reference to the map it will be seen that the lines and branches are not located with any view to constructing a single continuous line, or even two such, but with the evident purpose of providing for distinct lines, so located as to connect with each other. Of what possible interest was it to the public or to the United States, that these lines should all be built by one corporation, or that after construction they should all be under one management or control? The truth is, that the public interest is always best subserved by that competition which results from the establishment of independent lines, and not by combining in the hands of one company all the leading lines in a great State. The act of Congress was intended to aid in the construction of two great through-lines across the State of Kansas, and of two other lines called branches, extending from one of these through-lines to the other. The purpose was, by providing for these connections, to afford the best possible transportation facilities for the people. There was manifestly no purpose to provide for the control or management of these lines after construction.

(C)

Again, the act of 1863, plainly contemplates the keeping of the several lines and branches separate and distinct. It is plain that one or more might be built and the others not built; or that part of some or all the lines might be constructed, and the remainder not constructed. We have already seen that lands were to be sold by the State whenever "*any* twenty consecutive miles of *either of said roads or branches*" should be completed. (Sec. 4.) The phrase "roads *or* branches" is frequently employed in the act in a way to indicate the purpose of Congress to provide for one, or all, or for such part of one, or of all, the lines as should be constructed, and in the proviso to the first section, it clearly appears that the grant was to aid the roads and branches *severally*, and not jointly or collectively. That proviso is as follows:

> "*Provided further*, that the lands hereby granted for and on account of said road and branches *severally* shall be exclusively applied in the construction of the same and for no other purpose whatever," &c.

The argument in support of the contention that the State was bound to confer the entire grant upon a single company, is based entirely upon the use of the word "branch" in that part of the act of Congress which describes the line along the Neosho Valley. The use of that term does not necessarily imply that the ownership of main line and branch

shall be in the same party, much less that the State shall not employ one agency to construct the main line, and another to construct the branch. Congress has often employed the word "branch" in the enactment of land grant statutes, but never in the sense contended for by counsel for complainant. A familiar illustration of this is to be found in the Pacific Railroad acts, which created several main lines and numerous branches, all to be constructed and owned by distinct and separate companies. "A 'branch' of a railroad is merely a section, and "may be an offshoot from the main line, or a direct "extension from the terminus." Alb. Law Jour., Vol. 32, p. 143; West Pa. Railroad Co.'s Appeal, 104 Pa. St., 399. The *ownership* of the branch is immaterial.

The case of *St. Paul Railroad* v. *Winona Railroad*, 112 U. S., 720, is in point. There the Minnesota grant of 1857, which made provision for several lines *and branches*, was under consideration, and this Court said, pp. 725, 726:

> "In this act of March 3, 1857, and in the earlier act of May 15, 1856, granting lands to the State of Iowa for railroad purposes, and perhaps in other similar acts, Congress has, in a single statute, made provisions for several different roads, with different places of beginning and ending, and running in different directions. *These roads have, in every instance, been built by different corporations organized under State laws, having no other connection with each other than this common source from which the lands are received, and the rights and duties arising under*

these acts of Congress and the acts of the State on the same subject."

As already stated, the grant for the Neosho Branch was in the first instance, conferred by the State upon the Atchison, Topeka & Santa Fé Railroad Company. Afterwards, however, that Company assigned all its rights under the grant, so far as said Branch was concerned, to the M., K. & T., and the latter Company undertook to construct and equip the line and to perform all the obligations imposed by the State upon the former. (See Assignment, Record, p. 47.; Statement, p. 22.) This assignment was ratified and confirmed by an act of the Legislature of Kansas, approved February 26, 1867. (Record, p. 50 ; Statement, p. 34.)

The complainant does not, by any allegation of the bill, deny the power of the State of Kansas to ratify and confirm by legislative act, the above named assignment, and the question whether the Land Department of the Government erred in holding the same valid, is not, therefore, properly in the record.

United States v. *Atherton*, 102 U. S., 374.
Marquez v. *Frisbie*, 101 Id., 473.

Waiving, however, for the present, the question of pleading, we submit as entirely clear, that *it was within the power of the State of Kansas to authorize or ratify the assignment in question.*

The grant was to the State, and the Legislature was expressly authorized to dispose of it. As the

Legislature might in the first instance have conferred the grant for the Neosho branches upon the M., K. & T., so it might by subsequent action ratify and confirm the assignment by which that grant was transfered from the A., T. & S. F., to that company. It is not material to inquire whether the assignment would have been valid without the approval of the State, for it is clear that even if the A., T. & S. F. was incapacitated to absolve itself from the obligations it assumed by accepting the grant without the consent of the Legislature, it had a perfect right to do so with the assent of the Legislature.

Thomas v. *R. Co.*, 101 U. S., 71.
Redfield on Railways, 651, 652 (5th Ed.).
Shrewsbury, &c., R. Co. v. *London, &c.*, R. Co. O. H. L. Cas., 136, 137.
Greene's Brices *ultra vires*, 124, 125, note, and numerous cases cited.

The validity of the assignment in question was plainly recognized by this Court in the case of *Mo., etc., Ry. Co.* v. *Kan. Pac. R'y Co.*, 97 U. S., 491. In that case there was a controversy involving title to certain lands near Fort Riley, Kansas, which fell within the limits of the Pacific Railroad grant of 1862, and also within the act of 1864, and that of 1866, above mentioned. The case was decided in favor of the first named company, on the ground that its title took effect as of the date of the act of 1862, and was, therefore, prior and paramount to any claim arising under the subsequent acts.

The Court considered the effect of all these acts, and also of the assignment. As to the latter, it was said :

"Afterwards the Atchison, Topeka & Santa Fé Rail-
"road Company, *with the assent of the State*,
"transferred all its interest in the grant to the
"defendant, the Missouri, Kansas & Texas Rail-
"way Company which was originally known as
"the Union Pacific, Southern Branch, and is so
"designated in the act of July 20, 1866, which
"we shall presently consider." (P. 499.)

We shall refer to other portions of this opinion, under another head. We cite it now simply to show that the assignment was before this Court and its validity was not questioned.

A brief review of the Legislation of Congress will demonstrate that the Legislative policy has always been in the line of our contention.

Wisconsin.—By Acts of June 3d, 1856 (11 Stats., p. 20), and May 5, 1864 (13 Stats., p. 66), lands were granted to the State for railroad purposes. The act of 1864 was in part an enlarging grant over the 1856 lines, and in part for a new line. By resolution approved June 21, 1866 (14 Stats., p. 360), Congress recognized and named the State's grantee on the new line, and gave such grantee the right to change its route. Also by act of July 13, 1868 (15 Stats., p. 257), Congress extended the time for constructing a portion of the 1856–1864 line "to the West Wisconsin "Railroad Company," a "corporation estab-"lished by the laws of the State of Wisconsin, "*and which, by the law of said State, is entitled to* "*the land grant* made in the second section of "said act." By act of July 27, 1868 (15 Stats., p. 238), Congress authorized the Wisconsin Rail-

road Farm Mortgage Land Co., whose funds had aided construction of a portion of the roads provided for in the 1856 grant to the State, to receive the lands earned by such construction. By act of March 3d, 1875 (18 Stats., p. 511), Congress authorized "the Wisconsin Railroad Company," one of the State's grantees, to amend its location.

MICHIGAN.—By Act March 3d, 1865 (13 Stats., p. 520), Congress increased the grant of June 3d, 1856 (11 Stats., p. 21), to the State, *and named the beneficiary companies.* By act of July 3d, 1866 (14 Stats., p. 78), Congress extended the time to the "Amboy, Lansing & Traverse Bay "R. R. Co." (one of the State grantees under grant of 1856), for completion of its road, and added new conditions upon that company. By Sec. 2 of same act, it authorized "The Flint & "Pere Marquette R. R. Co." (another grantee under the State), to change its western terminus, adding "and any railroad corporations "having a right to the respective land grants "specified in the said act of June 3d, 1856, "located in the lower peninsula of the State of "Michigan, may unite and contract with each "other, or with any other railroad corporation or "corporations, *in the construction and operation "of a single line of road for any portion of their "routes, without prejudice to any land grants, or "other rights or franchises previously acquired.*"

By Act of May 20, 1868 (15 Stats., p. 252), Congress made enlarged provision for construction under the grant of 1856—naming the State's grantees. And by Sec. 2, authorized a patent to be issued to the Chicago & Northwestern R. R. Co. for certain land granted by Congress to the State, and by the latter conferred on said Company. By act of March 3d, 1871, (16 Stats., p. 586), Congress authorized the "Jackson, Lansing & Saginaw R. R. Co., * *

"and to which the said State granted a portion "of the land grant made to aid in the construc- "tion of a railroad from Amboy, by Hillsdale "and Lansing, to some point on or near Trav- "ers Bay, by an act * * * approv- "ed June 3d, 1856," to change its terminus.

By Act of April 20, 1871 (17 Stats., p. 643), Congress authorized the "Houghton & Ontonagon R. R. Co." (one of the State's grantees), to re-survey its line. And by act of May 23, 1872 (17 Stats., p. 160), similar privilege was granted the "Chicago & Northwestern Rw. Co."

ALABAMA.—By Act of March 3d, 1857 (11 Stats., p. 200), one of the designated beneficiaries under the grant of June 3d, 1856 (11 Stats., p. 17), was changed. By act of Feb'y 18, 1859 (11 Stats., p. 384), Congress extended the time for construction to the Mobile & Ohio Railroad Co., expressly recited therein as the grantee under the State. By act of March 23d, 1872 (17 Stats., p. 159), Congress confirmed the certifications of certain lands to the State under the grant of 1856 "for the sole use and benefit of the Selma, "Rome & Dalton Railroad Co., the successors "of the said Alabama & Tennessee Railroad "Co."

IOWA.—By Act of June 2, 1864 (13 Stats., p. 95), certain railroad companies named as grantees under the State grant of 1856 (11 Stats., p. 9), were granted additional lands—authorized to change their routes and build new lines.

KANSAS.—By Act of April 19, 1871 (17 Stats., p. 5), Congress authorized the Leavenworth, Lawrence & Galveston R. R. Co.,—one of the State's grantees under the act of 1863 involved in this case—to change its located route, south of Thayer.

By Act of July 24, 1876 (19 Stats., p. 101), Congress forfeited the grant for the unconstructed portion of the Leavenworth, Lawrence & Galveston road in Kansas, made to the State by the act of 1863, here in question, distinctly recognizing again the State's grantee by limiting such forfeiture to the lands "*which had not* "*been patented to said railroad company by the* "*United States under said grant or earned by the* "*completion of said road, and to which said com-* "*pany are not lawfully entitled.*"

MINNESOTA.—Act of March 3d, 1871 (16 Stats., p. 588), authorizes the St. Paul & Pacific R. R. Co. (a grantee under the State), to change its line in part. And the act of January 10, 1873 (17 Stats., p. 409), extended the time for completion of the "Winona & St. Peter R. R." (a grantee under the State). The acts of March 3d, 1873 (17 Stats., p. 631), and June 22, 1874 (18 Stats., p. 203), similarly extended the time for construction of the St. Paul & Pacific R. R.

These citations could be multiplied, but they are sufficient to abundantly illustrate our contention, and demonstrate that Congress, in recognizing by the grant of 1866, the rights of the Union Pacific Co., Southern Branch, under the former grants to the State, followed a consistent policy. Denial of such right would thus imperil titles everywhere. The technical objections urged here could be applied in varying form and degree to all the grants made to the States, and litigation multiplied beyond all bounds.

(D)

Finally, upon this branch of the case, we submit that under the act of 1863, the State was a trustee, clothed with full power to select the beneficiaries. The grant was made to the State with no restrictions as to the persons or corporations on whom it was to be conferred. All the limitations and restrictions contained in the act (except the third proviso to section 1, which is to be considered presently,) relate to the purposes for which, *and not to the persons to whom*, the conveyances shall be made. As to the latter there was a wide discretion. The State was to select the beneficiaries. It did so. A court of equity will not interfere with the exercise of discretion in such a case.

(2 *Pomeroy's Eq. Jur.*, p. 422, Note 1, pp. 420–421, 562,)

Moreover, it must be borne in mind that the State did not *grant* these lands to any corporation in advance of construction. Per contra, the State act of 1864 (Statement, p. 10) distinctly provided that on antecedent construction the State "hereby agrees to grant, bargain and sell" all that portion of the lands granted by Congress and applicable to the road constructed. The Company thereunder took the promise of a grant enforceable only after construction had been accomplished. The *title* was purposely retained in the State. All that the Atchison Company assigned was the right to earn the

lands under this contract. All that Congress desired was a road down the Neosho Valley. The State assented to the change of agency, the United States got the whole road far within the period prescribed for construction, and over it the mails, troops and government property have since been transported at largely reduced rates under the transportation conditions of the grant.

EFFECT OF THIRD PROVISO TO SECTION 1, ACT OF MARCH 3, 1863.

It was insisted by complainant's counsel below that the State of Kansas had no power to confer the grant for the Neosho Valley branch line, upon the Union Pacific, Southern Branch, Company (M., K. & T.), because that company had received a grant under the act of Congress of July 26, 1866. This contention is based upon the third proviso to Sec. 1, Act of 1863, which is as follows:

> "*Provided, also*, That no part of the land granted by "this act shall be applied to aid in the con- "struction of any railroad or part thereof, for "the construction of which any previous grant "of land or bonds may have been made by "Congress."

Although this point was not decided by the Court below, it was suggested in the opinion, and we assume that it will be renewed here. Our answers to it are as follows:

1. *The proviso related to grants made prior to the act of 1863.*

2. *Its purpose and effect at most was to prohibit the making of a double grant to aid in the construction of the same line, and the acts of 1863, 1864 and 1866, considered together, did not confer a double grant, but all together gave less than one full grant.*

3. *The act of 1866, between the termini here involved, regranted the same lands covered by the act of 1863, to aid in the construction of the same line of railroad, and to enure to the benefit of the same beneficiary.*

4. *The Land Department of the United States construed the law as authorizing the assignment, and the transfer of the land in controversy, to the State under the act of 1863, and by so doing deprived the M., K. & T. of the patent to which it was clearly entitled under the act of 1866, and therefore a court of equity will not, at this late day, depart from that construction, even if erroneous.*

Of these propositions in their order.

1. The proviso above quoted is a prohibition against the State transferring the lands to certain roads, namely, roads that have received aid in land or bonds by a previous grant. By the words "previous grant" is undoubtedly meant a grant prior to the grant of March 3, 1863, in which the words are used. Such is the fair and natural meaning of the words, and there is no ambiguity about them. Indeed, the meaning is so plain that we do not see how even the ingenuity of the most ingenious lawyer could have discovered a secret and hidden

meaning, such as that contended for by complainant's counsel.

It is reasonable to suppose that Congress, with knowledge of previous grants, should, in making the grant of March 3, 1863, establish and define its relation to prior acts. It is unnatural and unreasonable to suppose that Congress intended, in the act of March 3, 1863, to establish or define the relation of that act, or of the land granted by it to subsequent acts, the terms of which were necessarily unknown. At the date of the act of March 3, 1863, Congress had made grants of lands and bonds to other railroads, notably, to the Union Pacific Railroad Company, by the act of July 1, 1862. (See U. S. Statutes at Large, Vol. 12, page 480.) By section 9 of that act the Leavenworth, Pawnee & Western Railroad Company was authorized to construct a railroad from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to a point of connection with the main line of the Union Pacific Railroad, on the 100th meridian of longitude, west from Greenwich, between the north margin of the Platte and the south margin of the Republican river. By section 13 of that act the Hannibal & St. Joseph Railroad Company of Missouri was authorized to extend its roads from St. Joseph via Atchison, to connect and unite with the road through Kansas, for one hundred miles in length, next to the Missouri river. And by section 13 the Leavenworth, Pawnee & Western Railroad Com-

pany, of Kansas, was authorized to construct their road from Leavenworth to unite with the road through Kansas. The act of July 1, 1862, granted lands and bonds to the Hannibal & St. Joseph Railroad Company for its road in Kansas, and to the Leavenworth, Pawnee & Western Railroad Company for both its lines, one from Leavenworth and one from Kansas City. The Hannibal & St. Joseph Railroad Company and the Pacific Railroad of Missouri had been granted lands for their roads in Missouri by act of Congress dated June 10, 1852. (See U. S. Statutes at large, Vol. 10, page 8.) Thus it will be seen that the Hannibal & St. Joseph Railroad Company in Kansas, and the Leavenworth, Pawnee & Western Railroad Company of Kansas, covered by their routes in part, at least, the routes mentioned in the act of March 3, 1863, granting lands to the State of Kansas. It is, therefore, evident that the third proviso in section 1 of the act of March 3, 1863, prohibited the State from transferring the lands therein granted to the previously aided railroads; and the words "previous grant" referred to railroads for whose aid grants had been made by Congress prior to March 3, 1863.

Furthermore, other grants had been made prior to 1863 to roads in other states, which might be authorized to come into the State of Kansas and run along the routes described in the act of March 3, 1863, and these roads were within the prohibition of the proviso. There was not, however, any imitation imposed upon Congress as to the *future*

grants that were to be made, nor would such a limitation have been wise legislation. It would be all sufficient to put the limitation into the future grants when they came to be passed. The manifest purpose of the prohibition of the proviso was to prevent the granted lands of the act of March 3, 1863, from going to previously aided roads.

A proviso in a statute is to be strictly construed and takes no case out of the enacting clause which is not fairly within the terms of such proviso.

U. S. v. *Dickson*, 15 Pet., 54.

2. It is, however, immaterial whether said proviso be construed as referring to a grant made prior to the passage of the act, or prior to the time when the lands granted by the act were conveyed to the company. In neither case has it been violated. The purpose and effect of said proviso, at most, was, only to prohibit the conferring of a double grant for the construction of the same line. The act of 1863 and that of 1866 were not intended to, and did not, confer a double grant. The fact is, that the latter act was intended to be a mere *renewal* of the former. Let us note carefully the circumstances under which the latter act was passed. The acts of 1863 and 1864 had been passed, and by these acts construed together, provision was made to construct a line from a connection with the M., K. & T. at or near Fort Riley, down the Neosho

Valley to the southern line of the State. The grants for this line had been conferred upon the Atchison, Topeka & Santa Fé Railroad Company, *and by that company assigned to the M., K. & T.*, or Union Pacific, Southern Branch, Company. In effect, the A., T. & S. F. had declined the grant, and asked to have it conferred upon the M., K. & T., which was the company most interested in its construction, being the company of whose line the Neosho Branch was to form an important part. In this situation, Congress renewed the grant for the benefit of the Union Pacific, Southern Branch Co. (M., K. & T.), *which was named as beneficiary.*

These facts show that the act of 1866 to the point of junction with the L., L. & G. road was not intended as a new grant, but as a renewal and consolidation of the grants of 1863 and 1864.

It covered the same lands as the previous grants.

It gave aid to the same line.

It placed the legal title in the same grantee, the State of Kansas.

It differed from the previous grants mainly in naming the beneficiary; but in this Congress took notice of the assignment, and named the same beneficiary.

In construing a statute, aid may be derived from attention to the state of things as it appeared to the Legislature when the statute was enacted.

Platt v. *U. P. R. Co.*, 99 U. S., 48.

The idea of setting up one of these grants to defeat the other, when they were in fact intended as one, and when all rights under both have been vested in one and the same beneficiary, is foreign to the letter and spirit of the statute. That the act of 1866 was intended by Congress to be a mere confirmation and renewal of the acts of 1863 and 1864, is shown by the debate in the U. S. Senate upon the passage of the act, which is copied from the Congressional Record in the note, and especially by those portions printed in italics. (1)

3. Assuming *pro argumento*, that Congress did not then take notice of the present condition of af-

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(1) Railroad from Fort Riley to Fort Smith.

Mr. Hendricks—A week or two since the Senate passed a bill in relation to a railroad in Kansas. I did not support that measure; but there is a branch road connecting with that, and forming part of the same system, which ought to go to the House in connection with that bill. I speak of the road from Fort Riley to connect with the road which was provided for a week since. The two measures ought to go together to the House, to be considered there as they were considered by the Senate committee, as at the southern boundary line of Kansas they form one road, thence south in the direction of Fort Smith. I move, therefore, to take up Senate bill No. 224, with a view of passing it.

Mr. Pomeroy—I do not think there can be any objection to the bill.

The motion was agreed to, and the Senate, as in Committee of the Whole, proceeded to consider the bill (S. No. 224) to aid in the construction of a southern branch of the Union Pacific railway and telegraph, and to secure the Government the use of the same for postal, military and other purposes.

The Committee on Public Lands, to whom the bill was referred, had reported it back with an amendment, which was to strike out all of the original bill after the enacting clause and in lieu of it to insert the following:

[Here follows the bill.]

Mr. Hendricks—I move to amend the amendment of the committee in section 8, line five, by inserting after the word "Territory" the words "with the consent of the Indians, and not otherwise"; so as to make it conform to the bill that was passed the other day.

The amendment to the amendment was agreed to.

Mr. Conness—I thought as I listened to the reading of the bill that there was a restriction in it of the homestead settlements lying within this grant to eighty acres. I should like to inquire of those who have charge of the bill whether that is correct.

fairs under the grants of 1863 and 1864, and what is the legal status?

By the grants of 1863 and 1864, the title was outstanding in the State, subject to a condition subsequent, viz: construction of the road within ten years. But three years had elapsed when the grant of 1866 was made. Excepting only the few miles from point of junction with the L., L. & G. road in the Neosho Valley to the southern boundary of the State, all the odd sections from the initial point at or near Fort Riley to such point of junction had been granted by the act of 1863. Below such point came the Osage Indian Reservation, wherein this Court has decided that neither grant was operative.

Mr. Pomeroy—That applies to the homestead settlers on the even sections. That provision is inserted in all these bills. When homestead settlers go, after the passage of a railroad grant, upon the even sections which are held at $2.50 per acre, they get only eighty acres.

Mr. Conness— Is it confined to the even sections?

Mr. Pomeroy—Yes, sir.

Mr. Howard—I desire to inquire of the Chairman of the Committee on Public Lands at what point the contemplated railroad is to commence, where it is to terminate, and what is its probable length. I have not been able to ascertain very accurately what the facts are in regard to these matters. Where it goes I really do not know.

Mr. Hendricks—*I will explain to the Senator that three years ago, March 3, 1863, there was a grant of land made to a railroad from Fort Leavenworth by Lawrence to the southern boundary line of Kansas, in the direction of Galveston Bay. In connection with that grant there was a grant from Fort Riley, running in a southeastern direction to intersect that road near the southern boundary of Kansas. Now, this bill repeats that grant simply, and brings it into one law, and also extends it from the road running from Lawrence in a southern direction toward Galveston Bay. This bill extends the Fort Riley road across that road to Fort Smith, in Arkansas, so as to make a continuous railway from the Mississippi river, by Little Rock, to Fort Riley, thence in a southwestern direction to Fort Smith, connecting with the Pacific road.*

Mr. Howard—So that really this road will terminate on the Mississippi?

Mr. Hendricks—It will eventually have that connection when all the roads are finished to which the grants of land have been already made.

Mr. Howard—I wish merely to say that I thought this bill might contemplate the construction of a railroad from Fort Riley down

(*L., L. & G. Co.*, v. *U. S.*, 92 U. S., p. 733), thus leaving the grant of 1866 applicable only to a few miles in a total length of nearly two hundred. Assuming therefore that Congress in this instance, and at this early period intended to provide for two parallel lines of road (against all experience and fact), it is manifest that with nearly the whole of the lands covered by the grant of 1863, the aid given by the act of 1866 was a mere farce. No person nor corporation would have undertaken the construc-

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southwardly to Galveston Bay, a distance of about six or seven hundred miles, I believe.

Mr. Pomeroy—This runs to the southeast. *It is no new grant.*

Mr. Howard—*I believe not.*

Mr. Pomeroy—*Every acre has been granted in a previous bill, and this bill only consolidates the two grants.*

Mr. Hendricks—I will state to the Senator from Michigan that I thought two weeks ago we ought to confine the grant to Galveston Bay, or, rather, to the northern boundary of Texas, to the road to which we made the grant three years ago, but the Senate did not concur in that view, and this is a part of the policy agreed upon two weeks ago by the Senate.

Mr. Grimes—There is one question I should like the Senator from Indiana to answer.

Mr. Hendricks—I am not going to answer many questions.

Mr. Grimes—I should like to know whether the Senator has investigated the subject sufficiently so as to satisfy himself that if we pass this bill it will not mar the beauty and symmetry of that zebra-marked map which he exhibited to the Senate the other day, showing these additional railroad lines.

Mr. Hendricks—No, sir.

Mr. Grimes—If so, I am satisfied with the bill.

Mr. Hendricks—I will state to the Senator that from a point about seventy miles south of the southern boundary of Kansas it will start a new system of marks, in a southeastern direction to Fort Smith, and with that addition it will leave the maps as they are already marked.

The President *pro tempore*—The question is on the amendment of the committee, as amended.

The amendment, as amended, was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in. The bill was ordered to be engrossed for a third reading, was read the third time, and passed. The title of the bill was amended so as to read, "A bill granting lands to the State of "Kansas to aid in the construction of a southern branch of the Un-"ion Pacific railway and telegraph from Fort Riley, Kansas, to Fort "Smith, Arkansas."

(See Cong. Globe, 1st Sess. 39th Cong., Part 4, p. 3502.)

tion of nearly two hundred miles of parallel road, in order to earn a few thousand acres at its terminal point. The Company authorized by the State to construct and earn the grant of 1863, could well afford to accept the latter grant of 1866, but no one else could. Applying then the simple test of common sense to the proven facts, will here, as often, dissolve all doubt and demonstrate that Congress acting with knowledge of the facts, repeated and enlarged the grant of 1863, in direct recognition of the existing status. But in so doing it did not and could not *repeal* the earlier grant, nor did it attempt to do so. Congress did *not* contemplate the building of two roads side by side down the Neosho Valley, by two rival companies, each having a grant of the *same* lands. The conclusion is inevitable that Congress took notice of the fact that the A., T. & S. F. had relinquished to the M., K. & T. the grants of 1863–'4, and intended to ratify that transaction by conferring the same lands upon the new beneficiary in accordance with the agreement of all parties, and by giving to it the additional advantages provided by the act of 1866, to-wit: the right to take indemnity from *even* as well as odd sections. It is a significant fact that Congress, in the act of 1866, named the same beneficiary which had been selected by the parties in interest, including the State of Kansas; for although the act of the Kansas Legislature ratifying and approving the assignment was not actually passed until a subsequent day, yet the assignment had been executed, and it must then

have been well understood that the A., T. & S. F. would *not* build the line, or claim the grant, and that the M., K. & T. would do so. Besides the ratification of the assignment by the State, related back to its date and has full force from that time.

If the M., K. & T. had received land in excess of its grant, there would be a question as to the validity of its title to so much land as was received by it in excess of the limit; but even in that case the question could not be raised without proof sufficient to identify such lands.

The *U. S.* v. *B. & M. R. R. Co.*, 98 U. S., 334.

There is in the bill an allegation that "the said Missouri, Kansas & Texas Railroad Company received the full grant of lands donated to it by the act of July 26, 1866" (Record, p. 5); but no proof was offered in support of this averment, though it was explicitly denied by the answer (Record, p. 20); and of course there was no proof to identify any lands alleged to have been patented in excess of the limit. Under these circumstances, respondent (appellant) was not bound to offer any proof upon the point, but it nevertheless did so, and thereby established affirmatively and clearly the fact that the M., K. & T. actually received under all the acts of 1863, 1864 and 1866, much less than one full grant.

By the act of 1863 there was granted "every alternate section of land designated by odd numbers for ten sections in width on each side of said

road and each of its branches," with provision for indemnity. (Statement, p. 6.)

By the act of 1864 this grant was simply extended up the valley to Junction City. (Statement, p. 15.)

By the act of 1866, there was granted "every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all, ten sections per mile," with provision for indemnity. (Statement, p. 27.)

The beneficiary was, therefore, entitled to at least ten sections per mile. The distance from Junction City to the northern boundary of the Osage Indian Reservation, as the map will show, is about 128 miles. This would give a strip 128 miles long and ten miles wide, or in all 819,200 acres; whereas, the M., K. & T. has received in all but 711,471.82 acres, or 107,728.18 acres less than one full grant. These facts appear by letters from the Acting Commissioner of the General Land Office. (Record, pp. 68, 69, 70, 71.) This estimate does not, of course, include lands within the Osage Indian Reservation, to which the company got no title (*M., K. & T. R. Co.* v. *U. S.*, 92 U. S., 760); though the result would be substantially the same if these were included, for in that case the length of the grant and the quantity of lands would be correspondingly greater. In his opinion in this case below, the learned Circuit Judge remarks:

"Counsel say that it (the M., K. & T.) was entitled "to 819,200 acres at least, and received title to "only 712,000. It may be true that that is all "to which *it has received a good title;* but be- "yond this, 270,970 acres of Osage ceded lands "were patented or certified to it, and at the "time of this application and selection in 1872, "the title of the road thereto was, in the In- "terior Department, at least, supposed to be "perfect; for not until the October Term, 1875, "of the Supreme Court, was the title to these "lands declared void, and of the 712,000 acres "*to which it had a perfect title*, no more than "86,000 acres were conveyed after such de- "cision."

If it be true that the M., K. & T. got a perfect title to the 712,000 acres, as here stated, then the decree below must be reversed, because the lands in controversy are a part of the said 712,000 acres, having been, as shown by Exhibit D to the bill, certified to the State of Kansas, on the 10th day of April, 1873. (Record, p. 10.) That it was included in the 712,000 acres, see letter of Acting Commissioner. (Record, p. 70.)

It is true, as the Circuit Judge states, that it was supposed in the Interior Department that the M., K. & T. was entitled to the Osage ceded lands claimed, in addition to the 712,000 acres; but this claim was made for and on account of the construction of the line *through the Osage Indian Reservation*, for which, under this Court's decision, the company received no lands. The lands now in controversy were conveyed to the M., K. & T. for constructing the line *down to the Reservation*, and the fact that at

one time it claimed, and was supposed to be entitled to, lands for the line through the Reservation, cuts no figure and is wholly immaterial.

In the official report of the General Land Office for 1875 (Table, p. 407), the estimated quantity of the lands within the M., K. & T. Co.'s grant under the acts of 1863, 1864 and 1866 is stated as

..... 1,520.000 acres.

And the estimated quantity which the Company would receive therefrom is stated as

..... 950,000 acres.

In the report of the same office for 1884 (Table, p. 56), it is stated the Company has received

..... 983,985.86 acres.

From which, as explained by notes b., &c., at foot of page 57, there must be deducted 186,936.72 acres, lost to the road under the L., L. & G. decision *supra*, and 120 acres relinquished, thus leaving the Company 796,929.14 acres from an estimated grant of 1,520,000 acres, or about one-half. No lands have been conveyed to that Company since 1884.

4. AS TO THE EFFECT OF THE DECISIONS OF THE LAND DEPARTMENT OF THE GOVERNMENT, HOLDING THE ASSIGNMENT TO BE VALID AND DIRECTING THE LANDS TO BE CERTIFIED TO THE STATE UNDER THE ACT OF 1863.

Attention is specially invited to the decision of the Secretary of the Interior (Mr. Browning), of March 25, 1867 (Record, 65; Statement, 45), and to the correspondence relating thereto. (Record, pp. 60–64; Statement, pp. 40–43.) These show:

(a) *That the M., K. & T. claimed the lands in controversy under all the grants of 1863, 1864 and 1866; and*

(b) *That the decision of the Department was, that said company was entitled to the benefits of all the said grants.*

The question arose as to how, under the circumstances, the grants should be administered, and the decision of the Secretary, rendered upon an elaborate review of all the facts, was as follows:

> "In virtue of said assignment and the ratification
> "thereof by the legislature of the State of Kan-
> "sas, the lands inuring to the State under said
> "grants of 1863 and 1864 will be adjusted to
> "the State for the benefit of said Union Pacific
> "Railway (Southern Branch) Company upon
> "the principles heretofore established and now
> "in force, and then, if any lands remain to the
> "United States of odd sections within the limits
> "of twenty miles on each side of the railroad
> "between the termini mentioned, the said Union
> "Pacific Railway (Southern Branch) Company
> "will be entitled to patents for such odd sec-
> "tions, and also for such even sections as re-
> "main to the United States outside the ten and
> "within twenty miles of the road, upon com-
> "plying with all the terms, conditions and stip-
> "ulations of said act of July 26, 1866."

The effect of this decision was to order that all the lands covered by the acts of 1863 and 1864 should be adjusted to the State for the benefit of the M., K. & T., under those acts, and that the *additional indemnity* given by the act of 1866, should be selected and patented under that act.

The proof, then, is that the M., K. & T. claimed the land under all three of the grants, *and the claim was allowed*, but it was ordered that the title be passed under the acts of 1863–'4. We assume for the present (and will show later on) that said company was entitled to the benefits of the act of 1866. The Secretary so held, and that point is very clear upon the proofs. Such being the case, we submit that it would be contrary to the plainest principles of both law and equity, to permit the United States to assert that the decisions and orders of the Secretary above mentioned were erroneous. To allow this would be to permit the Government to take advantage of the error of its own agents, for the purpose, *not of securing, but of defeating, the ends of justice.* The M., K. & T. was entitled to the land in controversy under the act of 1866, in which it was specially named as beneficiary, and it demanded its rights under that act, as well as under the others. The Secretary of the Interior answered this claim by saying, in substance, to the M., K. & T. Company, "While this Department doubts not your rights under the act of 1866, it holds that you are also entitled to these lands under the acts of 1863–'4, and for its own convenience, it will order that you take

title under the latter acts." By this ruling the M., K. & T. was absolutely bound. It had no appeal. It could not sue the Government. Can the Government now be heard to say, that although the M., K. & T. was entitled to the lands under the act of 1866, yet as they were certified under the acts of 1863–'4, therefore the title should be returned to and quieted in the Government? At most, the complaint is, that the land was certified under the wrong act; or, in other words, that there was a mistake of law in certifying the land under the acts of 1863–'4, when it had been earned, and should have been patented or certified, under that of 1866. If there was a mistake in this respect, it was immaterial. It was not the fault of the M., K. & T. that the wrong act was recited, if such was the fact. Nothing is clearer than that the grantor in a deed who has received the consideration, and has not been defrauded in any way, can not ask to have his conveyance annulled on the ground that by his own mistake or that of his agents, there is an erroneous statement of fact recited therein. Although an instrument in writing may recite as the authority for its execution a statute which gives no such authority, yet if there be in existence another statute which does give it, the instrument will be held valid.

Commissioners v. *January*, 94 U. S., 202.
Broom's Legal Maxims, page 604.

This doctrine applies with double force to a case like the present, in which *only the grantor is*

complaining. There is but one claimant under the United States.

The United States is bound by the settled rules of law and equity which govern other litigants.

United States v. *Smith*, 94 U. S., 217.
United States v. *Bostwick*, 94 U. S., 66.
United States v. *State Bank*, 96 U. S., 36.
The Siren, 7 Wall., 159.

Under another head we shall show that the equities of the M., K. & T., under the act of 1866, were and are clear, and that by the order of the Secretary of the Interior, it was obliged to take title in the form shown, while claiming its rights under all the grants. This appearing, we feel confident that this Court will say that the decision of the Secretary, which the M., K. & T. was *obliged to accept*, and which has been acted on for ten or fifteen years, can not now be questioned by the Government, even if erroneous. The construction given to these acts of Congress by actual decision and by continued usage and practice, ought not to be set aside now. The conveyances here attacked were made about fourteen years ago, and have been acted upon from that day to this. Although the fact does not appear, it may be safely assumed that upon the faith of these titles, *bona fide* purchases have been made, bonds have been given, mortgages have been executed, and large sums of money in good faith invested. It is too late now for the

United States to call in question the soundness of the construction so long adhered to by its officers and agents.

United States v. *B. & M. R. R. Co.*, 98 U. S., 334.
United States v. *McDaniel*, 7 Pet., 1, 14.
United States v. *Graham*, 110 U. S., 219.

2 Op. Att'y-gen'l, 558; 10 Id., 52.

In the case first cited, this Court, speaking of the construction given by the Departments of the Government to certain land-grant acts of Congress, said:

"Such has been the uniform construction given to "the acts by all the Departments of the Gov- "ernment; patents have been issued; bonds "given; mortgages executed; and legislation "had upon this construction. *This uniform ac- "tion is as potential and as conclusive of the sound- "ness of the construction as if it had been declared "by judicial decision. It can not at this day be "called in question.*"

THE QUESTION OF ROUTE.

The contention of complainant is, that the Neosho Valley branch line was not constructed upon the route designated in the act of 1863, to-wit: From Emporia, where the A., T. & S. F. crosses the Neosho river, "down the Neosho Valley to a point where the said first named road (L., L. & G.) enters said Neosho Valley." (Statement, p. 6.)

The allegations of the bill upon this question of route are quite indefinite. It is not charged that the line was constructed on a different route from the one prescribed by the act, nor is there any specific allegation to show wherein the line, as constructed, varied from the line, as prescribed. The most natural construction of the averment would be to hold that it charges that the Neosho Valley line was not constructed *by the Atchison, Topeka & Santa Fe Company.* If this is all that is meant, the fact is admitted, and we have already shown that the act of Congress did not require the construction of the line by that Company. The allegation is as follows:

"And your orator further charges that the Atchi-
"son, Topeka & Santa Fé Railroad Company,
"on the 19th day of March, 1866, in consider-
"ation of one dollar, assigned its rights, fran-
"chises and land grant under said act of March
"3d, 1863, for its Neosho valley branch, to the
"said Missouri, Kansas & Texas Railroad Com-
"pany; and on the 26th day of February, 1867,
"the legislature of the State of Kansas, by
"resolution approved of that date, ratified said
"assignment, but the branch of the Atchison,
"Topeka & Santa Fé Railroad required by the
"said act of Congress of March 3d, 1863, and of
"the Kansas legislature of February 9th, 1864,
"to be constructed 'down the Neosho Valley
"to the point where the Leavenworth, Law-
"rence & Galveston railroad enters said valley'
"was not constructed within ten years, nor has
"the same ever been constructed, and no part
"of the lands hereinbefore described is situated
"within twenty miles of either side of any rail-
"road constructed by said Atchison, Topeka &
"Santa Fé Railroad Company, nor did any part

"of said land pass to said Missouri, Kansas & "Texas Railway, by virtue of said assignment "and said resolution of the legislature of the "State of Kansas."

Construing this averment, as we are bound to do, most strongly against the pleader, we submit that it charges nothing more than the failure of the A., T. & S. F. to build the line, and that it does not charge that the M., K. & T. failed to build along the prescribed route.

We proceed, however, to show,

1. That the M., K. & T. did construct its road along the prescribed route ; and

2. That the question of route was finally determined by the rulings and decisions of the Land Department.

1. It will be conceded that the line as constructed by the M., K. & T. runs from Emporia down the Neosho Valley to Chanute, where it crosses the L., L. & G. Chanute, or the point of crossing, appears to be near the Neosho river, and there is nothing to show that it is not at or near the point where the L., L. & G. "enters the Neosho Valley." The presumption is that the law was not violated. The theory of complainant is, however, that the point of junction was to be at the point where *water first begins to flow towards the Neosho river.* This is apparent, from the fact that the only proof offered to show a departure from the prescribed route, is the stipulation set out on page 23 of the Record, and which, among other things, sets forth :

"3d. The L., L. & G. R. R. crosses the M., K. & T. "R. R. Co. at Chanute, Kansas; at Colony, Kan- "sas, a point 28 miles north of Chanute, the L., "L. & G. R. R. first enters upon lands *from* "*which the natural flow of water is by way of the* "*Neosho River.*"

The only question presented by this record is, whether the point here designated and which may be called the "crest of the divide," is necessarily the point of junction? If so, it follows that Congress intended to compel the Company building the Neosho Valley Branch Line, to leave the valley and seek the high lands, "from which the natural flow of water is by way of the Neosho river," though to adopt such a line might, and probably would, have involved immense expense and almost insurmountable difficulties in construction, and might also have involved a total disregard of the public interests. This construction of the act would be contrary both to reason and authority. The exact point of intersection was left indefinite by the terms of the act—purposely so, no doubt.

The meaning of the words where the L., L. & G. "enters the said Neosho Valley" is quite uncertain. In one view, it may refer to the point where the waters first begin to flow toward the Neosho river, from the crest of the divide. In another view, it may mean the point where the narrow valley, commonly called the "bottom land" begins. In still another view, it may mean the low land nearest the river. It does not necessarily refer to either side of the river, because the line of the L., L. & G.

crosses the river and valley on either side. If coming eastward it enters the valley on the west side of the river; if going westward it enters it on the east side. But the exact point of the intersection or crossing was of no consequence. The general route was all that Congress undertook to prescribe. It was to be a line down the Neosho valley, connecting the two main lines, known as the A., T. & S. F. and L., L. & G., now Southern Kansas. What difference could it make to the United States or to the public, whether the junction was on the east or west side of the river? Evidently none, and it was clearly the purpose of the act to trust the discretion of the company building the line, in this respect.

To adopt the construction contended for by complainant, and hold that the junction was to be made at the crest of the divide, might have required the M., K. & T. to leave the valley proper and push its line up to the high lands—to the highest point to be found. It is impossible to believe that Congress ever contemplated anything so absurd as this. The authorities recognize a wide discretion in the company in the location of its line.

"The most practicable and advantageous line is to "be adopted, depending upon all the elements "entering into the *economy, productiveness and* "*local advantages*, which would be sought by pru- "dent men in determining such a question."

Thomas v. *Schuyler Co.*, 98 U. S., 169.

"Where all interested acquiesce in the route "adopted until the road is completed, it will re-

"quire a very clear case to induce the courts to "interfere."

Redfield on Railways (5th Ed.), p. 411, note 19, and cases cited.

And see, also,

Southern Minn. R. Co. v. *Stoddard*, 6 Minn., 150.

Benet v. *Railroad Co.*, 13 Ill., 504.

Van Hostrop v. *Madison*, 1 Wall., 291.

Mayor, etc., v. *B. & O. R. Co.*, 21 Md. 50.

In the Minnesota case here cited, it was held that there must be allowed "such discretion in the location of the route as is incident to an ordinary practical survey, but not deviating substantially from the course and direction indicated by the charter." In the Illinois case it was said that a change of route is not to be regarded unless such change makes "an improvement of a different character" materially affecting the interests of the party complaining.

The case in 1 Wall. well illustrates the doctrine that equity will look to the spirit, and not alone to the letter, of a statute defining the route of a railroad. There the requirement was that the authorized line should be *to* the City of Madison. A line extending to a point forty-six miles from Madison, and there connecting with another line running to that city, was held to be within the spirit of the statute. The Maryland case is to the same effect.

The same rule is established by statute in Kansas. (See Sec. 1176, Compiled Laws 1885; Statement p. 19), which gives every railway corporation power "to cause such examination and survey for its proposed railway to be made *as may be necessary to the selection of the most advantageous route.*"

2. Whatever doubt there may have been originally as to the proper point of junction between the M., K. & T. and L., L. & G., the question was settled by the ruling of the Land Department of the Government.

This precise question arose in the course of the administration of the grants of 1863–'4, and was fully heard and finally decided. (Record, p. 71; Statement, pp. 58–63.)

The decision of the Commissioner of the General Land Office here referred to, is elaborate, and shows that it was made upon full argument. The decision was, that the point where the L., L. & G. enters the Neosho Valley, "is the point where it reaches or crosses the river."

As a matter of course Congress must have contemplated that questions of this character would necessarially arise and be decided in the course of the administration of the grant. It must have been anticipated that the beneficiary, after constructing the line, or one or more twenty-mile sections thereof, would apply for a patent, and that the question would then arise, *Has the line been constructed as required by the act?* Such questions as the one we are considering would properly fall within the ju-

risdiction of the officers of the Land Department, whose duty it was to execute the statute. But Congress did not leave this to inference. On the contrary, the act created a tribunal for the decision of just such questions.

This was done by the fourth section of the act of 1863, which provides for conveying the lands as each section of twenty miles shall be constructed, upon the certificate of the Governor of the State, satisfactory to the Secretary of the Interior, that each section has been "completed in a good, substantial and workmanlike manner."

Following these provisions, referring to the several twenty-mile sections, is the following:

> "And when the Governor of said State shall so cer-
> "tify, and the Secretary of the Interior shall be
> "satisfied, that the whole of said road and
> "branches and telegraph are completed in a
> "good, substantial and workmanlike manner as
> "a first-class railroad and telegraph, the State
> "may cause to be sold all the remaining land
> "granted and selected for the purpose indica-
> "ted in this act, situated within the limits of
> "twenty miles from the line thereof throughout
> "the entire length of the road and branches."

This section creates a tribunal composed of the Governor of the State and the Secretary of the Interior, to pass upon all questions touching the construction of the road under the act. The Governor was to certify; the Secretary was to be satisfied; and, thereupon, the conveyance was to be made.

We have, then, not only the fact that the question of the proper place of junction was raised, dis-

cussed, and expressly decided, but also the fact that every question touching the construction of the line, including the question of route, must have been passed upon by the Governor of the State and Secretary of the Interior, in the discharge of the duties devolving upon them.

The question being one of fact only, or of mixed fact and law, the decisions of the proper officials of the Land Department is conclusive upon the United States.

"When a particular authority is confided in a pub-
"lic officer, to be exercised in his discretion,
"upon an examination of the facts, of which he
"is the appropriate judge, his decision thereon,
"in the absence of any controlling provision, is
"absolutely final."

Allen v. *Blunt*, 3 Story, 742.

The Land Department must necessarily

"Consider and pass upon the qualifications of the
"applicant, *the acts he has performed to secure the*
"*the title*, the nature of the land, and whether
"it is of the class which is open for sale. Its
"judgment upon these matters is that of a
"special tribunal, and is unassailable except by
"direct proceedings for its annulment or limit-
"ation."

Steel v. *Smelting Co.*, 106 U. S., 450.

And it is well settled that such direct proceedings cannot be maintained, except in cases of fraud or mistake of law.

Quinby v. *Conlan*, 104 U. S., 420.
Vance v. *Burbank*, 101 U. S., 514.
Moore v. *Robbins*, 96 U. S., 535.

No fraud is alleged here. The question as to the point of junction between the two lines, was one of fact, to-wit: Whether the point fixed was "at the point where" the L., L. & G. "enters the Neosho Valley."

If not a pure question of fact, it was at least a mixed question of law and fact, and in that case the result is the same. This rule was clearly laid down by this Court in *Marquez* v. *Frisbie*, 101 U. S., 476, where it was said, referring to the language employed in the earlier case of *Moore* v. *Robbins*,

> "This means, and it is a sound principle, that where "there is a mixed question of law and fact, and "the Court cannot so separate it as to see clear- "ly where the mistake of law is, the decision "of the tribunal to which the law has confided "the matter, is conclusive."

Where the question is a question of *law as applied to the facts*, the decision by the Land Department is final.

United States v. *Schurz*, 102 U. S., 401.

A moment's consideration will show that the question as to the proper point of junction was not a pure question of law. It cannot be decided now, by this Court, without going into questions of fact. How wide is the Neosho Valley at the place where

it is crossed by the L., L. & G.? What is the topography of the country? What, if any, difficulties of engineering would have been encountered by selecting another place of crossing? Is the valley well defined? Is the place of crossing on high or low land? How far is the point of junction from the Neosho river? How far is it from the summit or divide? How far is it from where the L., L. & G. first strikes the low lands near the river? Such questions as these must have entered into the decision of the question by the Land Department; and should this Court now undertake to review its decision, these questions of fact would have to be considered. But they can not be considered, because they are questions of fact, and also because there is no proof in the record concerning them. The only fact that appears in proof, touching this subject, is that the point of junction is some distance from the highest point on the divide or summit.

III.

The land in question was public land when selected and certified to the State under the act of March 3d, 1863, and it is therefore immaterial to consider as to its status at the date of the act, or at the date of the location of the line.

The land in question being indemnity land, not within the granted limits, the title did not pass at

the date of the act, but at the *date of its selection and certification,* to-wit: August 8, 1872. (Record, p. 35 *et seq.*)

Ryan v. *Railroad Co., 99 U. S.,* 382.
Kansas Pacific v. *A., T. & S. F. R. Co., 112 U. S.,* 414.
Barney v. *Winona, &c., R. Co., 117 U. S.,* 228.

The bill avers that the lands in controversy had been withdrawn from the market by an order of the Commissioner of the General Land Office, dated March 19, 1863 (Exhibit A to the bill), and that they remained by this order withdrawn for the benefit of the L., L. & G. Railroad "for ten years "thereafter." Hence, it is alleged that the land was not, at the time of selection, public land subject to selection for the benefit of the M., K. & T. This position seems to have been abandoned by complainant's counsel, but out of abundance of caution we call the attention of the Court to the fact that the withdrawal relied upon (Exhibit A to bill), came before this Court for consideration in the recent case of *The K. P. R. Co.* v. *A., T. & S. F. R. Co.,* 112 U. S., 414, and was there held to be entirely unauthorized and void. The Court said (p. 422):

"The order of withdrawal of lands along the 'prob-
"able lines' of the defendant's road made on
"the 19th of March, 1863, by the Commissioner
"of the General Land Office, affected no rights
"which without it would have been acquired to
"the lands, nor in any respect controlled the

"subsequent grant. And besides, it only pur-
"ported to apply to lands within the ten-mile
"limit," etc.

This withdrawal, therefore, was not only inoperative and void, but it did not purport to withdraw any lands for indemnity purposes, and therefore did not apply to the lands in controversy here. If it were necessary to go further, it would appear that the supposed withdrawal was not made for the benefit of the L., L. & G. alone, but for all the lines named in the act of 1863, including the Neosho Valley Branch Line. Also that it was a temporary order made in advance of a survey and based upon a "probable line" which was superseded by the definite location and order of withdrawal subsequently made. (Exhibit B to Bill.)

But, inasmuch as it is settled that the withdrawal did not affect the status of the lands in controversy, it is unnecessary to say more.

IV.

The M., K. & T. acquired the equitable title to the lands in controversy under the act of July 26, 1866.

By this act lands were granted to the State of Kansas,

"For the purpose of aiding the Union Pacific Rail-
"road Company, Southern Branch (M., K. & T.),

"the same being a corporation organized under "the laws of Kansas to construct and operate a "railroad from Fort Riley, Kansas, or near said "Military Reservation; thence down the valley "of the Neosho river to the southern line of the "State of Kansas, with a view to an extension "of the same through a portion of the Indian "Territory to Fort Smith, Arkansas." (Statement, p. 27.)

As we have already seen, this grant covered the same route and applied to the same lands embraced within the previous acts of 1863 and 1864, though it made a more liberal allowance for indemnity, and also contemplated an extension of the line further south. The lands now in controversy fell within the indemnity limits of this grant of 1866, as well as within the indemnity limits of the grant of 1863. Speaking of these facts in his opinion of March 25, 1867, Mr. Secretary Browning said:

"The ground from Emporia southwardly is covered "by the grants of 1863 and 1866, and from that "point northwardly by the grants of 1864 and "1866."

Under these peculiar circumstances, the Secretary of the Interior, as we have already shown, thought best to administer the several grants together as one (there being but one beneficiary), and accordingly directed that all the lands falling within the acts of 1863–'4, be certified to the State for the benefit of the M., K. & T., under those acts, and that the lands required to make up the deficit of indemnity be patented under the act of 1866. (Statement, pp. 45–'48.)

We think that we have shown that this mode of proceeding was sufficient to pass the legal title. We proceed now to show that if this were not so, the equitable title was beyond question vested in the M., K. & T. In the first place, let it be noted that the M., K. & T. Company built and equipped the line, as required by the act of 1866, made due proof of that fact, and claimed the land in question under that act, as well as under the others.

It performed every one of the conditions required of it as the beneficiary under that act.

(a) The road was constructed, and the Governor's certificate that it was completed according to law, was filed. (Record, pp. 51–'52; Statement, pp. 49–'51.)

(b) The road was completed within ten years, as shown by same proof.

(c) The company filed with the Secretary of the Interior maps of its line, designating the route thereof, as required by Sec. 4 of the act. (Exhibit C to Bill; Record, p. 10.)

(d) Upon the filing of said map the Secretary accepted same and withdrew from market the lands granted by the act, as well as those within the indemnity limits. (Exhibit C to Bill; Rec., pp. 61–'62.)

(e) The company accepted the terms of the act in writing, as required by Sec. 7. (Record, p. 76; Statement, p. 32.)

(f) It selected the lands in question as indemnity, under the act of 1866, in accordance with the

orders of the Secretary of the Interior regulating the manner of making such selections. (Record, pp. 34 to 41, also 91 to 98.)

The proof is clear that the M., K. & T. claimed the lands in controversy as enuring to it under the act of 1866. (Rec., 35–42.) And that this claim was distinctly admitted to be just by the Secretary. (Record, p. 65.) The M., K. & T. was then *entitled* to the lands under the act of 1866; but they were not certified or patented *under that act*, because the Secretary had considered it best to pass title under the acts af 1863–'4, as already explained.

It is now gravely asserted, that because the Secretary directed that the lands be certified under the acts of 1863–'4, when they had been earned and claimed also under that of 1866, the United States may take advantage of the Secretary's error (assuming that it was an error), and have a decree divesting the M., K. & T. and its grantees of all claim upon the land, legal or equitable. The Court below reached its conclusion upon this point "slowly and hesitatingly," and based it solely upon the ground that a selection of the indemnity lands *by the Secretary of the Interior* was required by the act, and that no such selection was made. We submit, that the Court below erred, both as to the fact and as to the law. And we submit, as a matter of law, that a failure on the part of the Interior Department to perform its duty with regard to the selection, would not defeat the equities of the beneficiary, provided it (the beneficiary) faithfully performed all the con-

ditions required of it. As a matter of fact, we submit that the lands in question were selected as indemnity under the act of 1866, in strict accordance with the law and with the rules and regulations of the Interior Department, regulating such selections.

1. As to the law:

It was decided by the Interior Department, and rightly, that the M., K. & T. had earned and was entitled to these lands. They had been selected and identified, as we shall presently see. *Suppose the Secretary, by mistake of law, directed that they be selected and certified under the wrong act.* What of it? Would that deprive the beneficiary of its rights?

It is a plain rule of common justice and equity, that when the beneficiary has earned particular lands, and has made the required proof, its equity is complete, notwithstanding the failure of the officers of the Land Office to do their duty. This rule was, clearly laid down by this Court in the recent case of *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, which, like the present case, was one involving title to indemnity lands. In that case the Secretary of the Interior, by an error of law, certified the lands to the wrong party, while in the present case he certified them to the right party, but (as we now assume) under the wrong act. This Court said (p. 733):

> "It is no answer to this to say that the Secretary of "the Interior certified these lands to the State "for the use of the appellant. It is manifest "that he did so under a mistake of the law, "namely, that appellant having made the ear-

"lier location of its road through these lands,
"became entitled to satisfy all its demands, ei-
"ther for lieu lands or for the extended grant
"of 1864, out of any odd sections within twenty
"miles of that location without regard to its
"proximity to the line of the other road. We
"have already shown that such is not the law,
"*and this erroneous decision of his cannot deprive*
"*the Winona Company of rights which became*
"*vested by its selection of those lands.*"

The recent case of *United States* v. *Cent. Pacific Railroad Co.*, in the United States Circuit Court for California (26 Feb. Rep., 479), is also strikingly in point. In that case it appeared that certain lands had been selected as indemnity *prematurely*. At the time of the selection the lands were not public lands, being then in litigation, and claimed under a Mexican grant, so that the selection, *when made*, was unauthorized and void; but afterwards the claim in litigation was decided so as to restore the lands to the public domain, and the equitable title of the company was sustained. The Court said:

"If this patent should be vacated, therefore, being
"no longer *sub judice*, the defendant would *now*
"be entitled to select these identical lands to
"compensate for the loss and receive another
"patent for them. * * * The re-
"sult might be only the substitution of another
"patent to the same lands for the one vacated,
"at a great deal of further trouble and expense,
"both to the United States and to the respond-
"ent. * * * Morally and legally
"the defendant is at this time clearly entitled
"to have these identical lands, there being no
"adverse claim to them. There is really no
"equity shown now in favor of the Govern-

"ment; on the contrary, the equities are all in "favor of the defendant. The Government has "realized all the benefits to be derived from "the construction of the road."

Further on, the Court quotes from 1 Story's Equity Jour., 203, thus:

"Courts of equity do not, any more than Courts of "law, sit for the purpose of enforcing moral "obligations or correcting unconscientious acts "*which are followed by no loss or damage.*"

And the Court adds:

"Much less will they interfere where no injury re- "sults and there is only a mutual innocent mis- "take, there being no moral wrong, and where, "to correct the mistake in favor of the party "complaining, would be inequitable and work "an injury to the other party. *Besides, if these* "*lands are now lost, all others open to selection* "*having at this day been disposed of, by reason of* "*a change of circumstances, the parties could not* "*be placed in statu quo.*"

All this, and much more, in the reasoning of this opinion, is exactly applicable to the case at bar.

The same doctrine was laid down in the case of the *United States* v. *B. & M. R. Co*,. 5 Dill., 297, and in the same case affirmed by this Court, 98 U. S., 334. There it appeared that the patents were issued in advance of construction, and therefore without authority of law; but the company, after receiving the land, went on and completed the construction. We quote from Mr. Justice MILLER's Opinion, 5 Dillon, 302, 303:

"If, then, the patents as they now stand, only rep-
"resent what the company was entitled to on
"the completion of the road, I think the error,
"if there was one, in issuing them too soon,
"does not require that they should be set aside,
"since the road has now been constructed for
"two or three years, and no possible injury can
"result to the United States. If my construc-
"tion of the 19th section of the amendatory act
"is sound, the defendant has received no more
"land than it was entitled to, by the mistake
"of the Commissioners, or any other lands than
"what it would have had, if it had received its
"patent for the whole, after the road was fin-
"ished. *If these patents were set aside, the com-*
"*pany could now ask that the same lands be re-*
"*patented to it.*"

In the case of the *Missouri Pacific Railway Co.* v. *Kansas Pacific Railway Co.*, already cited (97 U. S., 491), these several grants were considered by this Court, and the rule for which we are contending, viz.: that the act of 1866 covered the same lands as the earlier acts of 1863–'4, and that under it the M., K. & T. was entitled to all the lands not previously reserved or disposed of, was clearly recognized. In the course of the opinion, this Court, after reciting the history of these several grants, and referring to the matter of the assignment from the A., T. & S. F. to the M., K. & T., said (pages 499–500.):

"This Act of 1864 was never accepted by the State
"of Kansas. No route of a road between the
"points designated in it, was ever located by
"the Company, nor was any map of the pro-
"posed route ever filed in the Department of
"the Interior. Nothing, indeed, was done by

"the State or Company under the act *until af-*
"*ter the grant it offered had been superseded by*
"*the acceptance of the greater and more valuable*
"*grant made by the subsequent act of July 26,*
"*1866, which covered the same lands.*" (14 Stat.,
"289.)

The Court then proceeds to show (p. 500) that the act of 1866 was complied with by the M., K. & T. Company, and then adds:

"Upon the principle already announced in consid-
"ering the time when the grant to the plain-
"tiff took effect, the title of the defendant to
"the lands thus set apart to it, *had there been*
"*no previous disposition or reservation of them,*
"*would have become perfect, and, by relation, have*
"*vested from the date of the act.* But so far as
"the lands were identical with those covered
"by the previous grant to the plaintiff, by the
"acts of 1862 and 1864, the title could not
"attach, as it had already passed from the
"Government."

This ruling completely disposes of the present case, because there is no pretense that there was any previous disposition or reservation of the indemnity lands now in controversy, unless they were conveyed to the State for the M., K. & T. under the act of 1863; and in that case, the title of that Company was good under that act. It is clear as demonstration that our title must be good, either at law or in equity, under the one or the other of these acts, or under both, construed together.

We may add, that the fact that the act of 1864 was not accepted by the State (if it be a fact) does not affect in any way the present case, as the lands

here in controversy fell within the limits of the act of 1863, which *was* accepted by the act of the Legislature of Kansas of February 9, 1864. We think we have shown above that the State *did* accept by anticipation the grant of 1864, and confer it upon the A., T. & S. F. Company; but the point is not material to the decision of the present case.

2. As to the fact:

The Court below said, speaking of the lands in controversy,

> "Were they ever selected as indemnity lands under "the act of 1866? Respondent claims that "they were, but the evidence does not satisfy "me of the fact, but rather indicates the con- "trary."

In the earlier grants to States for railroad purposes, the General Land Office made conveyance by its own records. After definite location, *all* lands within the granted or place limits found subject to the grant, were conveyed, and the exact deficiency thus being ascertained, equivalent lands within the indemnity belt were set off in satisfaction thereof. No formal selection by the grantee was made, but before making conveyance the Land Office sent its prepared lists to the local land officers for comparison with their records, and to prevent mistake in conveying lands covered by some existing claim. Such service was laborious, and for it the local officers received no compensation. Hence, by act of July 1, 1864, Sec. 1 (13 Stats., p. 335), Congress re-

quired the grantee to make selection and file lists thereof with the local officers, paying prescribed fees to such officers, and "in accordance with such "instructions as shall be given by the Commis- "sioner of the General Land Office."

The language of the act of 1866 with respect to indemnity is as follows :

"But in case it shall appear that the United States "have, when the line of said road is definitely "located, sold any section, or any part thereof, "granted as aforesaid, or that the right of pre- "emption or homestead settlement has attach- "ed to the same, or that the same has been re- "served by the United States for any purpose "whatever, then it shall be the duty of the Sec- "retary of the Interior to *cause to be selected* for "the purposes aforesaid, from the public lands "of the United States *nearest to the sections* "*above specified*, so much land as shall be equal "to the amount of such lands as the United "States have sold, reserved, or otherwise appro- "priated, or to which the right of homestead "settlement or pre-emption has attached as "aforesaid, which lands, *thus indicated*, by the "direction of the Secretary of the Interior, "shall be reserved and held for the State of "Kansas for the use of said company by the "said Secretary, for the purpose of the construc- "tion and operation of said railroad as provid- "ed by this act."

The act required that the Secretary of the Interior should "cause to be selected" the indemnity lands. How was the duty to be performed ? Manifestly by issuing proper orders or regulations directing the mode of proceeding in making such selections. Of course a special order could be issued

in each case, or general rules and regulations could be adopted applicable to all cases. The Secretary of the Interior had chosen the latter course, and had on the 29th of January, 1867, under the act of 1864 *supra*, approved a circular of instructions issued from the General Land Office, "in regard to "selection in satisfaction of railroad and other Con- "gressional grants, with forms for verification of "lists of selections," etc. (Record, pages 91 to 98.) These regulations provided that the State, through its grantee, or the grantee, as the case might be, was required to file with the register and receiver of the proper land office, *descriptive lists* of the tracts of land claimed, etc. The party appearing as the agent of the grantee, was to file with the register and receiver evidence of his authority. The lists were to be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office; and it is declared that these lists "when so examined and "tested and found correct in all respects, *to be a final* "*location.*" The register and receiver were to certify at the foot of such list, according to a form prescribed.

By reference to the record, pages 35 to 46, it will be seen that the lands in question were selected under the act of 1866 (as well as under the other acts), *in strict conformity to these regulations.* Every step in the matter of this selection was taken under the act of 1866, as well as under the other acts, as

the proof shows, and nothing required by the regulations was omitted.

It is, therefore, perfectly apparent that the Secretary of the Interior did cause these lands to be selected as indemnity under the act of 1866, as required by that act.

When the Commissioner of the General Land Office came to certify the selected lists to the State, he followed the instructions of the Secretary, already cited, and made his certificates under the act of 1863 only. (Record, pp. 51–58.) *But this certificate of the Commissioner was no part of the selection.* That was complete under the act of 1866.

This question is put at rest by the ruling of this Court in *St. Paul Railroad* v. *Winona Railroad supra*, in which the rights of the litigating companies to certain indemnity lands in controversy depended upon the *priority of selection.* The Court found that no selection had been made by or on behalf of the defendant company. As to the plaintiff company, it was found that *it did, on the 23d of May, 1872, present lists of all the lands in controversy, to the local district land officers; that the office fees were paid, and that the lists were certified to the Department.* This was held to be a sufficient selection, this court saying:

"*There was then a selection of lands included in this "class, made by plaintiff, or for its benefit, on the "23d of May, 1872,* and no selection of them "ever made on behalf of defendant." (See 112, "U. S., p. 730–731.)

As our proof shows without dispute, that lists of the lands in controvesy here were presented to the local district land officers, that the office fees were paid, and that the lists were duly certified to the Department, all under the act of 1866, we confidently claim that there was a selection of the land under that act, within the ruling of the case cited.

The lands having been earned, and having been selected, according to law, the beneficiary was entitled, under the act of 1866, to a patent, *and as against the United States, a right to a patent is equivalent to a patent.* It was so held by this Court in the case of *Stark* v. *Starrs*, 6 Wall., where it was said (page 418):

"The right to a patent once vested, is treated by "the Government *when dealing with public lands* "*as equivalent to a patent issued.*"

To the same effect is *Barney* v. *Dolph*, 97 U. S., where the Court said (p. 656):

"When the right to a patent once became vest- "ed in a settler under the law, *it was equivalent,* "*so far as the Government was concerned, to a* "*patent actually issued.* We so decided in *Stark* "v. *Starrs*, 6 Wall., 402. The execution and de- "livering of the patent, after the right to it is "complete, *are the mere ministerial acts of the of-* "*ficer charged with that duty.*"

The lands, then, were granted by the act of 1866; they had been earned under that act; and they have been claimed *and selected* under it, and under it they should have been patented to the M., K. & T.; and if the present conveyance be set aside,

that company would have a perfect claim upon the Government for a patent conveying the same lands. Its equities are, therefore, too plain for argument.

V.

The case of Neer v. Williams, 27 Kansas, page 1.

This case of Neer v. Williams was an action of ejectment, involving a tract of land included in the land certified to the State for the use of the M., K. & T. as indemnity under the act of 1863. Whether it was a real or feigned controversy, does not appear. Certain it is, however, that the *facts* as they now appear in proof, were not before the Court in that case; and many admissions were there made which were not true. The Court below cites the case with the remark, however, that the "case was submitted upon an agreed statement of facts, some of which are now not only not admitted but vigorously and *successfully* disputed" (Statement, p. 72.) This statement of the Court below is sufficient to destroy the force of the opinion in question as authority in the present case; but inasmuch as the case will again be cited, we desire to point out more clearly the grounds upon which we submit that the case can not be regarded as entitled to any weight in determining the present controversy.

1. In that case it is intimated that the legal title was not vested in the State, because there was no patent from the United States. The attention of the Court was evidently not called to section 2,449 of the Revised Statutes of the United States, which distinctly provides that the list of lands duly certified by the Commissioner of the General Land Office shall convey the fee simple of all the lands embraced in such list to the State. Nor was the Court's attention called to the rulings of this Court upon the construction of this statute.

Frasher v. *O'Connor*, 115 U. S., 102.

As such a certificate is in evidence in this case, it clearly appears that the legal title passed to the State, and from the State to the M., K. & T. Besides, the Court also overlooked the repeated decisions of this Court, to the effect that by virtue of the grant alone as to the lands in place, and by virtue of the grant and the selection as to indemnity lands, the legal title passes. In construing a grant like that of 1863, this Court said, in *Van Wyck* v. *Knevals*, 106 U. S., 360:

"The legal title under the grant goes to the State,
"but the equitable title vests in the company."

2. The following facts admitted by the agreed statement of facts in the case of *Neer* v. *Williams*, are clearly disproved in the present case.

(a) By the fourth paragraph of the agreed statement, it was admitted that the land there in controversy was

"*Beyond* the end and within twenty miles of the "point where said branch intersected the Leav- "enworth, Lawrence & Fort Gibson Railroad, "but would not have been within a strip twen- "ty miles wide, lying parallel to said branch on "either side thereof," &c.

This admission took the land in controversy out of the limits of the grant. No such fact is alleged or shown here, but the contrary.

(b) The agreed statement, as well as the Court's opinion, treated as valid and effective the withdrawal of March 19, 1863, of lands along the "probable" route of the L., L. & G., and assumed by reason of that order, that the lands did not enure to the benefit of the M., K. & T., either under the act of 1863, or that of 1866. This Court has now held that the said order was unauthorized, and that it was never intended to apply to indemnity lands. (*K. P. R. R. Co.* v. *A., T. & S. F. R. Co.*, 112 U. S., 414.) This leaves the decision in *Neer* v. *Williams* without support, in fact or in law.

(c) It was admitted that the Neosho Valley branch has never been built or constructed (Par. 10.)

(d) The whole case was submitted upon the theory that the point where the L., L. & G. "enters the Neosho Valley" is the place where the *road first enters upon land drained by said river and its tributaries.* (See paragraphs 22, 13 and 14 of agreed Statement.) This absurd theory is not admitted here, and is not admissible.

(e) The question of the equitable title of the M., K. & T. under the act of 1866, was not considered in the case of *Neer* v. *Williams*.

Finally, that case was one presenting questions of title under acts of Congress, and even if the facts had been the same as in the present case, the decision could have had no authoritative force.

VI.

THE BILL.

We submit, the bill is fatally defective, and can not support the decree entered below.

It recites that:

> "Your orator, Benjamin Harris Brewster, Attorney-general of the United States of America, for and on behalf of the United States of America, brings this, HIS bill against the Kansas City, Lawrence & Southern Railroad, a corporation organized under the laws of the State of Kansas, and thereupon YOUR ORATOR complains and alleges."

The term "Your orator," viz.: Benjamin Harris Brewster, Attorney-general, throughout the bill, precedes every charge, declaration or statement. And the bill concludes with the following prayer:

> "YOUR ORATOR prays that this Honorable Court may order, adjudge and decree that the legal title in and to the said lands claimed as fore-

"said by the said defendant *is vested in your or-*
"*ator, and of right belongs to your orator*, and
"that said certification of said lands by the
"Commissioner of the General Land Office to
"the State of Kansas for the benefit of said
"Missouri, Kansas & Texas Railroad Company,
"and said patent from the Governor of the
"State of Kansas to the said Missouri, Kansas &
"Texas Railroad Company for said lands,
"annexed hereto as Exhibit 'D,' be decreed
"null and void, and without authority of law,
"*and that they constitute a cloud on the said legal*
"*title of your orator*, and that the same be re-
"moved, and that the said defendant be per-
"petually enjoined from setting up any claim,
"either in law or in equity, in or to any of said
"lands, and that YOUR ORATOR may have such
"further and other relief in the premises as the
"nature of the circumstances of this case may
"require, and to this Honorable Court may
"seem meet." (Rec., p. 6.)

We submit, such form of pleading is *sui generis*. Neither as Attorney-general nor otherwise had Benjamin Harris Brewster, as "your orator," the legal title to these lands, nor any connection therewith. If the prayer of the bill will not support a decree in favor of the United States the objection is necessarily fatal.

Whilst this objection was not made below, we submit, it may be raised in this Court; for, as Judge STORY well observes,

"If a decree is made, it may for this very defect, be
"reversed on a re-hearing, or on appeal."

Story Eq. Pleading, Sec. 75.

Such form of pleading is not sustained in either English or American practice.

In England the Crown may sue in equity to protect its own direct interest, or for those

> "Who partake of its prerogative, or claim its pecu-
> "liar protection. In all such cases the suit is
> "instituted by the proper public officer to
> "whom that duty is entrusted—and this ordi-
> "narily is the Attorney-general. Where the
> "suit immediately concerns the rights and in-
> "terests of the Crown, the public officer sues in
> "his own official name, without uniting that of
> "any other person."
>
> Story's Eq. Pleading, Sec. 49.

Conversely, the Crown can only be reached by a petition of right, sent into Chancery, where

> "Directions are given that the Attorney-general
> "should be made a party to the same."
>
> *Ibid*, Sec. 69.

In Curtis' Equity Precedents, p. 132, is given the form of an

> "*Information to set aside a patent of lands granted by*
> "*the Crown, which had been unduly obtained*"
> (the precise equivalent of the suit at bar). A
> note thereto explains that same is taken
> "without alteration from Willis' Equity Plead-
> "ings."

Same avers at the beginning the seizin of the Sovereign—proceeds to charge by the Attorney-general (inter alia) that the defendant ought

"To account and make satisfaction *to his Majesty* "for the waste already committed * * * *" and to deliver "up the said premises *to his Maj-* "*esty*." That he refuses so to do, "whereby *his* "*Majesty* is deceived, not only to his disinheri- "son, but to the apparent prejudice to the "Crown." * * * And that *his Maj-esty* may "have such discovery as aforesaid." The prayer is that the defendant "may be de- "creed to make satisfaction to *his Majesty*, for "what shall appear to be due *his Majesty*." * * * "And that your lordship would be pleased "to grant your informant on *behalf of his Maj-* "*esty*, such other and further relief," &c.

In the case at bar, no such form of averment is indulged, nor is any relief asked for the United States except by mere inference. The direct prayer is that title be vested in the "Orator" and all the relief prayer is on behalf of such "Orator," viz.: the *person* and *officer* named.

The bill is equally faulty when tested by the practice and decisions of the Federal Court.

In *Dugan* v. *United States*, 3 Wheaton, 172, the question was whether the United States could sue in their own name on a bill of exchange purchased with Government funds and endorsed to their Treasurer. In affirming the right so to do, the Court said:

"There is a fitness that the public by its own offi- "cers should conduct all actions in which it is "interested, *and in its own name.*"

Benton v. *Woolsey*, 12 Pet., 27, involved "a bill "of information and complaint in the name of "the District Attorney, in behalf of the United "States."

In commenting on the form of such procedure, the Court said :

"No objection has been made to it, either in the "Court below or in this Court, on the part of "the defendants, and we think the United "States may be considered as the real party ; "although in form, it is the information and "complaint of the District Attorney. But al- "though we have come to the conclusion that "the proceeding is valid, and ought to be sus- "tained by the Court, *it is certainly desirable "that the practice should be uniform in the Courts "of the United States ; and that in all suits where "the United States are the real plaintiffs, the pro- "ceeding should be in their name, unless it is "otherwise ordered by Act of Congress.*"

This decision clearly condemns the form of the present bill.

To same effect is the opinion of Attorney-general Cushing (7th Op., p. 50), that

"Except in such exceptional cases in which express "provision to the contrary is made by statute, "the suits of the United States must be brought "in their name."

The question also arose in the United States District Court of Rhode Island, in *The Attorney General* v. *The Rumford Chemical Works et al.* (2 *Banning & Arden Patent Cases*, p. 298). The proceeding was by information to vacate certain letters patent filed by Geo. H. Williams, as Attorney-general, on the relation of one Hecker. On demurrer the Court dismissed the proceeding, holding (*inter alia*) that Mr. Williams, neither as Attorney-general nor otherwise, was authorized

"As such, and in his own name to file an informa-
"tion or commence proceedings by bill in
"equity."

That in the form presented it was his individual action, abating with his death or resignation, and not the suit of the United States.

The decision cites *Benton* v. *Woolsey supra*, and concludes that if Sec. 359, conferring upon the Attorney-general power to appear and argue any case in which the United States is interested, also confers upon him power to commence proceedings otherwise than through the District Attorneys.

"There is no right expressly given or to be implied,
"from any words in this or any other statute,
"to bring the suit in his own name instead of
"in the name of the real party, the United
"States."

It is well settled, that when the United States enter the courts of the country as a litigant, they stand on the same footing with private individuals, and are subject to the same rules which prevail among and concerning private suitors.

U. S. v. *Flint*, 4 Saw. 58.

That a bill so filed by an individual would be fatally defective, does not admit of question. Wherein does the United States stand on different ground? The relation of the Attorney-general to his Government is but representative, and the settled rules of pleading do not permit such form of plea.

Thus, in suits by persons under disability—where a *prochein ami* is necessary—the person un-

der such disability is the plaintiff or "orator," and the prayer for relief runs in same form.

Curtis' Equity Procedure, pp. 2–6.

The power of a trustee to sue in his own name is undoubted. As *holder of the legal title*, he is the party with whom the law deals. Yet the beneficiaries under him are often held to be necessary parties. But a mere representative holding in effect the relation of attorney and client, can not thus sue nor ask relief. Here the Court must assume the United States to be the party plaintiff against the averment of the bill to sustain the action. Under the authorities cited such form of pleading is condemned. Certainty and uniformity of procedure are vastly more important than maintenance of the suit at bar. If the bill be dismissed (as we insist it should be), a new proceeding can be commenced in proper form. If permitted to stand, no adverse comment on such practice will work as complete a remedy as would be effected by such dismissal.

Again, *the complainant (appellee) can not recover, because no fraud is alleged, and no mistake of law is particularly set forth in the bill and sustained by proof*.

This Court has settled the rule that a bill in chancery, to annul a patent of the United States for public lands on account of mistake of law on the part of the officers of the Land Department, must

set out distinctly the particulars showing the character of the mistake and how it occurred.

Marquez v. *Frisbie*, 101 U. S., 472.
United States v. *Atherton*, 102 U. S., 372.

In this case an examination of the bill will show that the only alleged mistake of law which is particularly set forth, is the selection of the lands in controversy for the benefit of the M., K. & T., when they had been previously reserved by the order of March 19, 1863 (Exhibit A to bill), for the benefit of the L., L. & G. The bill upon this point is explicit, and it is manifest that it was drawn for the purpose of presenting this as the controlling question. The subsequent decision of this Court in the *Kansas Pacific* v. *A., T. & S. F.*, already cited and commented on, put an end to this contention by holding that the withdrawal of March 19, 1863, was void, and besides was never intended to be applicable to lands outside of the ten-mile limits. This ruling has driven the complainants to the necessity of attempting to raise other questions not thought of when the bill was drawn, and which are not raised by any specific and particular allegations. It is, we submit, impossible to find in the bill any sufficient allegations of mistake of law on the part of the officials of the Land Department with respect to any other matter whatsoever.

Tested by the familiar rule that "He who seeks equity must do equity," this proceeding is wholly without merit. The Bill alleges no fraud, actual or

constructive; no imposition, real or imagined. Nothing is shown which in any manner injured the United States. The State and her subordinate grantees had fully earned these lands under the grants of 1863 or 1866, or both. They were claimed in the most formal manner under both acts. The United States by the appropriate tribunal declared the State entitled under the earlier grant. Suppose, in law, she was not so entitled? Then clearly the grant of 1866 was operative. The lands were public and of the very class from which the grant of 1866 was to be satisfied. The road thereunder had been fully constructed. Every condition of the grant had been fully met. The United States was then—has ever since, and is now—daily enjoying the direct benefit of such construction, by the transportation of its mails, troops and property at largely reduced rates. The compensation for the grant has been fully paid. Will a Court of Equity permit the lands to be taken away from the grantee, whose compliance with all the conditions on its part to be performed is not and can not be denied?

To create an equity *under* the United States, the bill avers that prior to May 19, 1873 (the date of the patent from the State to the company), these lands had been surveyed as public lands, and as such were subject

"To purchase by actual settlers, and to homestead
"and pre-emption entry under the laws enacted
"by the Congress of the United States. * *

"That pursuant to such laws a large num-
"ber of actual and *bona fide* settlers went upon
"said lands, and having all the qualifications
"required by said laws, made settlement and
"lasting and valuable improvements thereon,
"and now occupy the said lands as there homes,
"and are entitled upon payment therefor, to
"receive patents for the same from your ora-
"tor." (Rec., p. 1.)

Not a scintilla of proof is offered to sustain this averment.

The lands were selected as indemnity August 8, 1872, and under the decisions of this Court the grantee's right thereto, attached, if at all, from the date of such selection. The pleader does not aver such settlements at or prior to *that* date. The proof *contra* shows by the certificate of the Register and Receiver attached to the list of selections, and bearing same date therewith (Aug. 8, 1872), made in accordance with Departmental regulation,

"That the whole of said lands are surveyed public
"lands of the United States and within the
"limit of twenty miles on each side of said
"roads, and that the same are not nor in any
"part thereof returned and denominated as
"mineral land or lands, nor claimed as swamp
"lands, *nor is there any homestead pre-emption,*
"*State, or other valid claim to any portion of said*
"*lands on file or record in this office.*" (Rec., 41.)

This proof wholly destroys the mere allegation of the Bill. If such allegation were true in fact (which we deny), it would demonstrate only that such parties were trespassers without color of right, possessing no equities, moral or otherwise.

Yet such averment in the bill does show a contradiction in terms which, in declaring these lands to be *public* and open to settlement, maintains as against the grantee under the act of 1866 that they were *reserved* by a withdrawal in 1863, and were *not* public lands subject to selection on August 8, 1872, under such grant. Applying to this bill the familiar rule that facts must be pleaded according to their legal effect, we submit, the averment that such lands were public and open to settlement, necessarily pleads also that they were likewise *as public lands within the indemnity limits*, subject to selection. When so selected, as shown by the certificates of the Register and Receiver *supra*, they were free from *any* adverse claim. They were then due in satisfaction of lands lost within the grant in place. *The selection is still subsisting. It is perfect today*, and, as shown above, the company can not, with every acre available, secure its full grant. It follows, necessarily that these lands properly come under the grant.

Respectfully submitted,

GEO. W. McCRARY,
A. T. BRITTON,
JAMES HAGERMAN,
A. B. BROWNE,
Solicitors for Appellant.

118-682

SUPREME COURT UNITED STATES.

OCTOBER TERM 1886.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY,

Appellant,

against

BENJAMIN HARRIS BREWSTER, Attorney-General, &c.,

Appellee.

Appeal from the Circuit Court of the United States for Kansas.

ARGUMENT OF

JOHN F. DILLON

In Support of the Title and Equity of the Appellant's Grantor.

BURGOYNE'S "Quick" Printing House, 146, 148 & 150 CENTRE ST., N. Y.

SUPREME COURT UNITED STATES.

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY,
Appellant,

AGAINST

BENJAMIN HARRIS BREWSTER, Attorney-General, &c.,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR KANSAS.

ARGUMENT OF

JOHN F. DILLON

In Support of the Title and Equity of the Appellant's Grantor.

BY THE BILL OF COMPLAINT, the United States claims as against the defendant, the title to 20,732.50 acres of

land in Allen County, Kansas, which is therein specifically described.

Record, pp. 1, 2.

These lands are all in *odd* numbered sections within the Overlapping twenty mile indemnity limits of the grants made by the Acts of Congress of March 3, 1863, and July 26, 1866, to the State of Kansas, to aid in the construction of railroads along certain defined routes, on which the defendant (by its former name, the *Leavenworth, Lawrence and Galveston R. R. Company*) and the *Missouri, Kansas and Texas Railway Company* (as the Assignee of the *Atchison, Topeka and Sa Ta Fe R. R. Co.*), and, in its own right, constructed their several roads;—these two roads having widely separated initial points (respectively, Lawrence and Junction City, at or near Fort Riley), but coming together down the valley of the Neosho River, and crossing each other at the town of Chanute, near the lands the title to which is the subject-matter of this suit.

I.

Under the Acts of Congress (March 3, 1863, and July 26, 1866), and the Acts of the Legislature of Kansas (February 9, 1864, accepting the grants, and February 26, 1867, ratifying the assignment by the Atchison Co. to the M., K. & T. Co.), the Missouri, Kansas and Texas Railway Com-

pany, the grantor of the defendant, by virtue of selection of the lands in question as indemnity lands (Record, p. 35) and the certification thereof to the State (Record, pp. 53-58), and the patent from the State to it (Record, pp. 10-12), lawfully acquired the full legal title thereto, or what in this suit is the equivalent, became the full equitable owner thereof, and the United States has no equity to cancel or vacate the defendant's title.

THE LANDS IN QUESTION are more than ten miles from the roads severally constructed by the M., K. & T. Co. and the defendant company down the valley of the Neosho River, but within twenty miles of each of said roads, and are, therefore, lands situated within the indemnity, and not within the granted, limits. This is alleged in the Bill (Record, p. 3, fol. 5), and admitted by the Answer (Record, p. 18, fol. 30).

THE TITLE ACQUIRED BY THE M., K. & T. COMPANY UNDER THE ACT OF MARCH 3, 1863, IS THIS:

1. Grant by Congress to State of Kansas "for purpose of aiding in the construction" of a branch down the Neosho Valley (Emporia) to the point where the first named road (the one built by the defendant's predecessor) enters the Neosho Valley" of lands as set forth in said Act of Congress of March 3, 1863.

2. Statutory contract by the State of Kansas by its Act of February 9, 1864, with the Atchison, Topeka and Santa Fe Company, herein called for

short the Atchison Company, making it the beneficiary of the land grant for the said Neosho Valley branch or road.

3. Assignment of March 19, 1866, by the Atchison Company to the M., K. & T. Co. of its right to the land grant appertaining to the Neosho Valley Road, which assignment was "ratified and confirmed" by the State by the Joint Resolution of February 26, 1867, which had the effect to substitute, with the consent of the State, as to the Neosho Valley Road, the M., K. & T. Co. as the beneficiary of the land grant for that road in the place of the Atchison Company.

4. Filing on December 3, 1866, by the M., K. & T. Co. of a map of definite location under Act of March 3, 1863 (Record, pp. 58–59, certificates thereon reprinted in appellant's Statement and Copies of Statutes, pp. 38–40), as well as under the Act of July 1, 1864, and July 26, 1866.

Record, pp. 60–67.

5. Actual completion within time of the entire Neosho Valley Road by the M., K. & T. Co. opposite the lands in question "from Junction City to the southern boundary of the State," prior to July 13, 1870, and the filing on July 25, 1870, of the map of such completed line with the Secretary of the Interior, accompanied with a certificate of the Governor of Kansas that the road had been completed and equipped as required by the Acts of 1863, 1864 and 1866.

Record, pp. 50–52.

6. Actual selection, under both the Acts of

1863 and 1866, by the M., K. & T. Co. of the lands in question as indemnity lands on August 8, 1872 (Record, p. 35), and *due certification* thereof to the State on April 10, 1873.

Record, pp. 53–58.

On March 25, 1867, Mr. BROWNING, the Secretary of the Interior, recognized the assignment by the Atchison Company to the M., K. & T. and determined the principles on which the grants made by the Acts of 1863, 1864 and 1866 would be adjusted by the department.

Record, p. 65.

See also Record, pp. 60–65.

In 1870 the Leavenworth, Lawrence and Galveston Company fell into a dispute with the M., K. & T. Co. as to their respective rights under the Acts of 1863 and 1866, and on September 15, 1870, the Commissioner of the General Land Office decided it, reaffirming the decision of Mr. BROWNING in 1867 (*supra*) and *holding that the M., K. & T. was entitled to the benefits of the Act of 1863 and could not be confined to the Act of 1866*; also holding that the point of junction was properly made at Chanute; allowing an appeal, but none was taken.

Record, pp. 71–76.

Under and pursuant to these decisions, which placed these companies on an equality of right under the Act of 1863, they united in making the selections of the lands in question of August 8, 1872, both companies claiming under the Act of

1863, and the M., K. & T. also under the Act of 1866.

Record, p. 35.

Afterwards the L., L. & G. Co. relinquished its rights to the lands thus selected to the M., K. & T. Co. and requested patents to issue to it.

Record, p. 46; pp. 53–58.

The selections were approved, and as the lands in question were within the twenty mile limits of lands granted by the Act of 1863 and were *odd* sections, they were, April 10, 1873, certified to the State for the benefit of the M., K. & T. Co. as having been granted by the Act of 1863.

Record, pp. 53–58.

7. May 19, 1873, the State patented them to the M., K. & T. (Record, p. 10, Exhibit D), and they were conveyed by the M., K. & T. to the defendant's predecessor.

Record, pp. 12, 13; Exhibits "E" and "F."

The foregoing also shows the claim of title and right of the M., K. & T. (defendant's grantor) under the Act of July 26, 1866, as well as under the Act of 1863.

It also shows full and strict compliance by the M., K. & T. with all the conditions and provisions of the Acts of 1863 and 1866, and especially with the fundamental and primary condition and consideration of the grant, viz., the building and completion of the road, *thereby earning the lands.*

THE NEXT INQUIRY IS INTO THE GROUNDS ON WHICH THE GOVERNMENT ASSAILS, IN THE BILL OF COMPLAINT, THE TITLE AND RIGHT OF THE APPELLANT COMPANY.

Before referring to the Bill of Complaint to ascertain the grounds of such attack, let us collate from the Record and briefly state the more material facts in chronological order:

ABSTRACT FROM RECORD OF MATFRIAL FACTS.

March 19, 1863. WITHDRAWAL OF LANDS under Act of March 3, 1863, "along the lines or routes of the railroads and branches provided for in this act," according "to diagram showing *probable lines* of said roads and branches with ten-mile limits on either side." The withdrawal is limited "to lands lying within the ten-mile limits as designated on said diagram." This was received at the Local Land Office on May 5, 1863.

Exhibit A, Record, p. 7.

March 19, 1866. ASSIGNMENT by Atchison Company to the M., K. & T. Co. (under its former name).

Record, p. 47.

The Atchison Co. in December, 1865, had surveyed a line from Council Grove to Emporia.

See Engineer WALKER'S Affidavit to Map of December 3, 1866, Record, p. 5; Map, p. 58.

December 3, 1866. M., K. & T. Co. DULY FILES MAP OF DEFINITE LOCATION from "Junction City near Ft. Riley (on Kansas Pacific) to the northern boundary of the Osage Indian reservation."

Record, pp. 58, 59, where said map is given. See Affidavits and Certificates annexed thereto, reprinted in copy of Statement and Statutes at pp. 38–40.

☞ NOTE.—That M., K. & T. claimed under *all* the Acts—1863, 1864 and 1866—and its claim was allowed, and the basis of adjustment of land grant under the several Acts was clearly defined and settled by Secretary BROWNING.

Record, pp. 60, 61, 62.
See Record, p. 65 (text of Secry. BROWNING's decision), and Record, p. 71 (text of decision of WILSON, Com. G. L. O.), reaffirming same, on Sept. 15, 1870.

March 19, 1867. (Recd. at local Land Office, April 3, 1867.) WITHDRAWAL OF LANDS under Act of 1866, for M., K. & T. Co., according to map filed (Decr. 3, 1866, *supra*) "of all odd numbered sections within the ten-mile limits and all the vacant lands [*i. e.*, odd and even sections] between the ten and twenty-mile limits."

Record (Exhibit C), pp. 9, 10.

April 30, 1867. L., L. & G. Co. files map of DEFINITE LOCATION, and lands withdrawn accordingly.

Record, p. 9 ; Map, p. 30.

July 13, 1870. GOVERNOR OF KANSAS CERTIFIES, in due form, to the due completion of the M., K. & T. road, *under Acts of March 1, 1863, July 1, 1864, and July 26, 1866, and the Act of Kansas of February 9, 1864,* "from Junction City to the southern line of the State of Kansas."

Record, p. 52.

This certificate shows full compliance by the M., K. & T. Co. with the Acts of 1863, 1864 and 1866, *i. e.*, that the lands granted by those acts for this whole line of road had been earned, and earned in time.

September 21, 1871. GOVERNOR OF KANSAS CERTIFIES to the completion by the L., L. & G. Co. "of that portion of its railroad commencing at Lawrence, Kansas, and ending at the south line of the State of Kansas."

Record, p. 32.

August 8, 1872. JOINT SELECTIONS of lands in ques-

tion by the M., K. & T. under the Acts of 1863 and 1866, and by the L., L. & G. under that of 1863.

Record, p. 35.

April 10, 1873. LANDS CERTIFIED to the State for the benefit of the M., K. & T., the L., L. & G. having previously relinquished to the M., K. & T., and requested patents therefor to issue to the M., K. & T. Co.

Record, pp. 46, 53–58.

May 15, 1878. Secry. SCHURZ's decision as to validity of M., K. & T. title.

Record, p. 84.

March 11, 1882. Commissioner MCFARLAND's letter recommending it as "the better course to have all the questions raised in the premises passed upon by the Courts," and the company's "assent to the bringing of this suit."

Record, pp. 78, 83.

CASE MADE BY THE BILL OF COMPLAINT.

After a careful reading of the Bill of Complaint, I have found it difficult to ascertain just what its grounds for equitable relief are.

(*a*) *What the Bill Does* NOT *Show:* It alleges NO FRAUD practiced by the Railway Companies, or any of them, or by any one else, on the Government or its officers in securing the certification of the lands in question.

(*b*) It alleges no specific MISTAKE OF LAW OR OF FACT, in the certification of these lands to the M., K. & T. Co.

(*c*) It alleges no facts known to the United States in 1883, when the Bill was filed, that IT DID NOT KNOW in 1873, when the lands were certified, and it sets up no

excuse for the long delay, and no facts negativing laches in bringing the suit or showing that the companies are not prejudiced by such delay and laches.

(*d*) It shows that the M., K. & T. fully EARNED ITS LAND GRANT, and that these lands were received as part of those which it had earned; but does not show that if the title thereto is set aside, the United States has other lands yet undisposed of within the indemnity limits, out of which the M., K. & T. Company could now get the quantity of lands to which the completion of the road entitles it. That is, the Bill neither offers to do equity, nor shows that the United States is in a situation to do, or to permit, equity to be done to the defendant or to its grantor, the M., K. & T. Company.

(*e*) It sets up the ASSIGNMENT BY THE ATCHISON COMPANY TO THE M., K. & T. COMPANY, of March 19, 1866, under which the latter company acted, built the portion of the road opposite these lands, but it does NOT ATTACK THE ASSIGNMENT, and states no ground showing that the assignment should not have the same effect as against the United States that was given to it by the two Railway Companies themselves and by the State of Kansas by its legislative approval and confirmation thereof.

What the Bill DOES *show as its ground of relief:* It alleges that the lands in question were *withdrawn* under the Act of March 3, 1863, by Exhibit A to the Bill, on March 19, 1863 (Record, pp. 3, 7), as being lands "within the first ten-mile limit" of the diagram of the *probable route* of the L., L. & G. Railroad, and for its benefit, and remained so withdrawn and reserved for ten years thereafter" (Record, p. 3, fols. 4 and 5). That

by the second withdrawal (April 30, 1867, received at local land office, May 10, 1867, Exhibit B) based upon map of *actual location* of the L., L. & G. Railroad, "said lands were shown to be more than ten miles from the line of said railroad, but within twenty miles therefrom" (Record, p. 3, fol. 5); which fact is admitted be the answer (Record, p. 18, fol. 30).

That the *L., L. & G. Co.* was not entitled to the lands in question because it has never constructed that part of its road "from Leavenworth to Lawrence, nor its branch from Lawrence by the valley of the Wakarusa River," by reason of which failure the L., L. & G. Co. it is alleged was "not entitled to any indemnity lands whatever under the said Act of Congress of March 3, 1863, whereupon said lands," it is further averred, "reverted to the United States, and by the Forfeiture Act of Congress of July 26, 1876, were restored to sale and settlement under the pre-emption and homestead laws of the United States" (Record, p. 4, fols. 6 and 7).

That the *M., K. & T. Company*, though it actually completed its road down the Neosho Valley opposite these lands, is not entitled thereto under the Act of 1863, because the *Atchison Co.* did not construct said road down the Neosho Valley, "nor did any part of said land pass to the M., K. & T. Railway by virtue of said assignment and said resolution of the Legislature of the State of Kansas" [no facts, however, being stated for this general legal conclusion].

Record, p. 4, fol. 7.

Nor, it is further alleged, is the M., K. & T. Com-

pany entitled to the lands under the Act of July 26, 1866, by reason of

"the said lands having been previously reserved under said Act of Congress of March 3, 1863, for the benefit of the L., L. & G. Railroad," consequently "the same were not subject to the operation of said Act of Congress of July 26, 1866, or of the said last-mentioned order of the Commissioner [viz., order of April 3, 1867] directing the withdrawal of lands thereunder."

Bill, p. 4, fol. 6.

THE PROOFS are wholly documentary.

TITLE OF M., K. & T. CO. AS ASSIGNEE OF THE ATCHISON COMPANY UNDER ACT OF 1863, CONSIDERED. THE ASSIGNMENT IS VALID AND EFFECTUAL.

The allegation of the Bill is simply that the *Atchison Co.* did not build the Neosho Valley road "nor did any part of said lands pass to the M., K. & T. Railway by virtue of said assignment and said resolution of the State of Kansas" of February 26, 1867.

Record, p. 4, fol. 7. *Text of assignment*, Record, pp. 47–49. *Text of Kansas joint resolution*, February 26, 1867, "ratifying and confirming" said assignment, Record, p. 50.

THE ASSIGNMENT IS VALID. As one claim of the M., K. & T. Company is under the assignment I will first discuss its validity, subject to the decision of the Court upon the preliminary question whether the Bill of Complaint impugns its validity.

1. The Bill nowhere sets up any facts showing this assignment to be invalid, nor does it allege even in the most general terms its invalidity; and, therefore,

we confidently insist it is not open to the Government to ask relief, which involves, or is based upon, such invalidity.

2. But if this objection, regarded by me as insuperable, can be overcome, then I insist that the assignment was clearly authorized by the laws of Kansas, has been ever since acted upon by both companies, and never questioned, is not inconsistent with any provision of any Act of Congress, was impliedly recognized and assumed in the Act of July 26, 1866, and has since been three times distinctly recognized and acted upon by the Land Department of the U. S. in adjusting the land grants in question.

THE MATERIAL FACTS AS RESPECTS THE ASSIGNMENT ARE, SHORTLY, THESE :

1. The Act of March 3, 1863, makes *the grant direct to the State,* and in no manner limits the State as to the mode in which it shall use the lands to aid in the construction of the lines of railroads and branches described in the Act. It might build the railroads itself or it might select one, two, three or four companies and make them the beneficiaries of the grant. *In short, the agencies and method of construction were left entirely to the State.*

2. The lands are granted

"*For and on account of said roads and branches* SEVERALLY," *not collectively*, and it is provided that they " shall be exclusively applied in the construction of the same, and shall be disposed of only as the work progresses through the same " (*Act 1863, Sec. 1, second proviso).*

THE SUGGESTION OF HIS HONOR, in the opinion below, that Congress

" obviously contemplated a single trunk line

running southwestwardly through this State with a branch down the Neosho Valley *all under one management* and control,"

obviously overlooks the language of the Act above quoted as well also as the purpose of Congress, which was to aid the building of certain lines of railway, but without any interest or concern as to what agencies or companies should build them.

3. The transfer and assignment were expressly "ratified and confirmed" by the Legislature.

> Record, p. 50, for text of legislative joint resolution.

It was, moreover, in accord with the general legislation of the State of Kansas.

> See Act of February 13, 1865, sections 22, 25; Laws Kansas, 1865, pp. 94, 101, 104.

4. It was acted upon by the M., K. & T. Co., which built its road from Emporia south to Chanute, claiming the benefit of it as against the United States (Record, pp. 60, 61, 65, 71), and it has never been questioned by either company, or by the State of Kansas, from that day to this, or by the United States, unless in and by the present Bill.

5. The claims of the M., K. & T. Company, as such assignee, were considered by Secretary BROWNING, and held valid (Record, pp. 62, 65); who, on March 25, 1867 (Record, pp. 65–67), established the basis of the adjustment of the land grants under the Acts of 1863, 1864 and 1866. His decision was reaffirmed, and its principles applied, September 15, 1870, by Commissioner WILSON

(Record, pp. 71, 72), and again in the *certification* of the lands in question (being *odd* sections not requiring a patent) under the Act of 1863.

Record, pp. 52–58.

UNDER THESE FACTS, on what principle can the United States collaterally question the validity of the assignment in a suit, to which only one of the companies is a party, to set aside the certification of the lands?

Neither corporation objects to the assignment. The State of Kansas, by its Legislature, expressly approved of what had been done. Congess, in the Act of July 26, 1866, impliedly approved it. The road for which Congress made the grant has been built and completed by the company for whose benefit the Act of 1866 was passed. And the objection now made in behalf of the United States is that the road down the Neosho Valley ought to have been built by the Atchison Company, and not by its assignee, the M., K. & T. Company.

Why so? The Act of 1863 makes no grant to the *Atchison* Company or to any company. Congress did not know the Atchison Company or deal with it. It dealt alone with the State of Kansas. The State was the grantee and trustee. The State originally selected the Atchison Company as its agency and beneficiary, but it afterwards assented to the substitution of the M., K. & T. Company in its place as respects the Neosho Valley branch.

What disabled either the State or the companies from so doing? On what ground or principle can the United States object? What possible difference did it make to the United States whether the road down the Neosho Valley was built by the Atchison Company or

the M., K. & T. Company? The obligations of the companies to the United States (Sec. 3, Act 1863, and Secs. 3 and 5 of Act of 1866) are in either event precisely the same. Such land grants have always been treated as assignable, and are in their nature so.

Platt vs. Union Pacific R. R. Co., 99 U.S., 48.
Jerome vs. McCarter, 94 U. S., 734.
Grinnell vs. Chicago and Rock Island Ry. Co., 103 U. S., 739.

I have thus, I think, placed the validity of this assignment and transfer beyond substantial controversy.

THE NEXT QUESTION IS AS TO THE EFFECT OF THE ASSIGNMENT AND TRANSFER IN CONNECTION WITH THE ACTS OF 1863, 1864 AND 1866. THESE ACTS GRANT AID BUT FOR ONE ROAD DOWN THE NEOSHO VALLEY.

The leading proposition which I make in this connection is, that the Act of July 26, 1866, was amendatory and supplemental to the Acts of 1863 and 1864; and, when applied to its subject matter, did not displace the Acts of 1863 and 1864, so far as they went, but was intended to make further provisions to aid the building of a more extensive line of road, *of which the Neosho Valley Road described in the Act of 1863 was to be a part.*

When the Act of July 26, 1866, was passed, Congress knew that the M., K. & T. Company had become the assignee of the Atchison Company as to the road from Emporia south along the Neosho Valley to the crossing of the L., L. & G. Road.

The debates show this, and, if they did not, knowledge by Congress of a public fact of this nature could well be judicially assumed.

The State, in its act of acceptance and regrant of February, 9, 1864 (Sec. 3), had made it obligatory on the Atchison Company to build from Emporia *north* to an intersection with the Kansas Pacific at or near Fort Riley, if Congress should, before March 4, 1866, make a land grant therefor. The Atchison Company so agreed with the State (Record, p. 59), and the M., K. & T. assumed this obligation.

Record, pp. 47–49.

BY THE ACT OF 1863 AND THE ACT OF 1866 TAKEN TOGETHER ONLY ONE ROAD DOWN THE NEOSHA VALLEY [*i. e.*, from Emporia to Chanute] WAS INTENDED TO BE AIDED, and as to that road the Act of 1863 is not impliedly repealed by the Act of 1866, but only supplemented by it. The other view would impute to Congress the unprecedented absurdity of making two distinct land grants for two separate roads lying side by side, running down the same valley and connecting the same railroads, places and regions. The view for which I contend is the one which was adopted by the companies and the State and it is the one actually taken and held, as we have seen, by the Department in 1867, 1870, and 1873, in the administration of these very grants.

See Secretary BROWNING'S opinion and decision of March 25, 1867 (Record, pp. 65–67).

Commissioner WILSON'S opinion and decision of September 15, 1870 (Record, pp. 71, 72).

See, also, Company's *selections* of the lands under the Act of 1863 as well as 1866 (Record, p. 35), and *certification* of the *odd* sections, now in dispute, under the Act of 1863 (Record, pp. 53–58).

Commissioner WILSON hits the nail on the head when he says, as respects the Neosha Valley road, "that the only advantage inuring to the [M., K. & T.] company by the Act of 1866 is the more liberal promise made for indemnity" (Record, p. 72, fol. 135), *i. e.*, it extended indemnity (Sec. 1) to *all* "public lands" within the indemnity strip, *i. e.*, to *even* as well as *odd* sections, and placed the right to sell the granted lands and the indemnity lands upon the same footing, if that right did not exist before. If the matter was *res nova*, I confidently stand on the Department's construction as the true one; and his Honor's suggestions, in the Opinion below, as to securing the benefits of both grants by building only one road, are thus shown to be without force or applicability. *Properly construed, there is but one grant in two Acts for one road, and that road was built and completed by the M., K. & T. Company.* The lands in question were, therefore, properly certified under the Act of 1863, to the benefi s of which Act the M., K. & T. was entitled as the assignee of the Atchison Company, recognized as such both by the State and by Congress. Consequently, the groundwork of the Bill that "no part of the land passed to the M., K. & T. Co. by virtue of said assignment and said resolution of the Legislature of the State of Kansas" wholly fails.

EFFECT OF THE WITHDRAWAL OF 1863, OF THE JOINT SELECTION IN 1872, AND OF THE FAILURE OF THE L., L. & G. CO. TO BUILD ITS WHOLE ROAD.

The Bill (Record, p. 3) sets up as an objection to the title of the M. K. & T. Co. to the lands in question *that they were withdrawn* for the L., L. & G. Co., May 5, 1863 (Exhibit A to bill, Record, p. 7), as being "within the first ten-mile limit of that railroad as shown by a diagram of its probable route," and, hence, were reserved and appropriated for that company. These lands were afterwards found to be not within the 10-mile limits, but outside of the 10, and within the 20-mile, limits (Bill, p. 3; Ans., p. 18). They were also withdrawn April 3, 1867, under the Act of 1866 for the M., K. & T. Company (Bill, pp. 3, 4; Exhibit C, p. 9). And it is alleged in the Bill that this withdrawal was invalid because of the previous withdrawal of May 5, 1863, under the Act of 1863 (Record, p. 6).

In fact, this seems to be the substantive case made by the Bill, viz.: that the withdrawal of 1863 along the "probable lines of the said roads and branches" had the effect, in some way, to deprive the M., K. & T. Company of the right to the lands in question earned by the completion of the road.

The objection is, perhaps, only set up to defeat any claim of the M., K. & T. Company to the lands under the Act of July 26, 1866, erroneously treating that Act as making a new and entirely independent grant, and as superseding, that is, repealing by implication, *pro tanto*, the Act of 1863.

I PROCEED TO SHOW THAT THE WITHDRAWAL OF 1863 WAS WHOLLY WITHOUT EFFECT ON THE RIGHTS OF THE

M. K. & T. COMPANY EITHER UNDER THE ACT OF 1863 OR 1866.

On this point, it ought to be sufficient to refer to the Kansas Pacific vs. At., T. & San. Fe Co., 112 U. S., 414; but I will briefly discuss it irrespective of that case.

The Act of 1863 contained no provision for any withdrawal. The withdrawal of 1863 was entirely an administrative act. It had no effect on the rights of the respective companies as to what particular lands they were severally entitled to receive. This was fixed by the map of *definite* location. THE GRANT of 1863 was "of every alternate section of land designated by odd numbers, for ten sections, in width on each side of said roads and each of its branches" (Act 1863, Sec. 1). But if by reason of the exceptions, it should appear "when the lines or routes of said roads and branches were *definitely fixed*" that the companies had lost any of the granted sections they were entitled under the Act of 1863 to indemnity for such loss out of the nearest *odd* sections within lateral limits of 20 miles. The Act of 1866 extended the M., K. & T.'s right of indemnity ALSO to even sections within such 20-mile limits.

The M., K. & T. first made a definite location of its route and first completed its road. And there is no ground to claim that because these lands were shown by the diagram of probable route made *without surveys* in 1863, to be within the ten-mile limit of the road of L., L. & G. Co., that they were, therefore, not subject to be taken as indemnity lands by the M., K. & T. Co., when the map of definite location showed that they were beyond the 10-mile but within the 20-mile limits.

In 1872 both roads were completed opposite these lands, and under the Acts of Congress it was "the duty of the Secretary of the Interior" upon the filing of the map of definite location to cause indemnity lands to be selected for each of them. The dispute between the companies as to their respective rights was settled by Commissioner WILSON'S decision of Sept. 15, 1870 (Record, pp. 71, 72), affirming equality of right as to the *odd* sections; but under the Act of 1866 the M., K. & T. had the right to look for indemnity to the *even* sections after exhausting the old sections.

Such was MR. BROWNING'S and MR. WILSON'S construction of the acts and they were constructions the the most favorable to the U. S.

Record, pp. 66, 67, 71, 72.

THE COMPANIES MADE A JOINT SELECTION, *inter alia*, of the lands in question, August 8, 1872 (Record, p. 35), and the L., L. & G. Co. relinquished its rights to the M., K. & T., and the lands in question were accordingly certified to the State, April 10, 1873 (Record, pp. 53–58), and by the State patented to the M., K. & T. Co., May 19, 1873 (Record, p. 10), and by the latter company conveyed to the L., L. & G. Co., the predecessor of the defendant.

Record, pp. 12–16.

IN CONSIDERING THE EFFECT OF THE JOINT SELECTIONS made on August 8, 1872 (Record, p. 35), let us first recall the material dates and facts: The M., K. & T. Co. had filed its map of *definite location* on December 3,

1866, claiming under *all* the Acts (Record, pp. 60-62, 65). The L., L. & G. Co. had filed its map of *definite location* on April 3, 1867.

Record, p. 9; p. 30, Map.

Indemnity lands might, therefore, have been selected for M., K. & T. Co. as early as 1866, and for the L., L. & G. Co. as early as 1867 (Act 1863, Sec. 1; Act 1866, Sec. 1). On July 13, 1870, the Governor certified to the full completion of the M., K. & T. road from Ft. Riley to the south line of Kansas (Record, p. 52); and on September 21, 1871, certified to the completion by the L., L. & G. Co. of "that portion of its railroad commencing at Lawrence and ending at the south line of the State of Kansas."

Record, p. 32.

These lands now in question had not been selected as indemnity. The ten years given by the Act of 1863 (Sec. 4) for full completion of the roads had not expired, and would not until 1873, and the ten years given to the M., K. & T. by the Act of 1866 (Sec. 3) would not expire until 1876.

Both companies were confined as to that part of their roads opposite the lands now in question, to common indemnity limits of 20 miles.

We do not have to consider at this point whether the M., K. & T., by reason of its prior definite location and prior actual completion, might not have a preferential right of selection of lands within the common indemnity limits; nor the further question whether the M., K. & T. Co. having a right to indemnity out of both odd and even sections, while the L., L. & G. had the right to

indemnity only out of odd sections, the latter company, in case of a deficiency, could not have compelled a *marshalling of securities*, so to speak, for the reason that the two companies treated the case as one falling within the principle "*that equality is equity*," and they made, on August 8, 1872, a joint selection of the lands in question—all of which are *odd* sections—the M., K. & T. making the selections claiming under the Act of 1863 and 1866, and the L., L. & G. under the Act of 1863.

Record, pp. 35–42.

These lands were within the common or conflicting indemnity limit—were *selectable* by each company as indemnity lands—and the Department having by Secretary BROWNING's decision in 1867 (Record, pp. 65–67) and Commissioner WILSON's decision of Sept. 15, 1870 (Record, pp. 71, 74, 75) affirmed an equality of right in the two companies, pursuant to which they made a joint selection of the lands in controversy, those selections will be held to have been properly made. But on December 13, 1872, the L., L. & G. Company, under its corporate seal,

"Relinquished all their right, title and interest in the lands in question to the Missouri, Kansas and Texas Ry. Co., and requests that patents therefor may issue to said M., K. & T. Railway Company."

Record, p. 46.

THIS RELINQUISHMENT AND REQUEST were filed with the Department (Record, p. 46), and the lands were accordingly certified to the State, April 10, 1873 (Record, pp. 53–58), and by the State patented, May 19, 1873, to the M., K. & T. Co. (Record, pp. 10–12), and by it conveyed to the defendant (Record, pp. 12, 14).

All of the lands now in question and thus certified to the State were charged to the land grant account of the M., K. & T. Company, as part of the lands to which that company was entitled as indemnity for those which *it* lost in place.

IF THE L., L. & G. CO. HAD NOT THUS RELINQUISHED ITS RIGHTS to the lands in suit to the M., K. & T. Co., a novel question of, perhaps, some difficulty might have arisen in respect thereto, under section 4 of the Act of 1863, owing to the *subsequent* failure of the L., L. & G. Co. to build that part of its road from Leavenworth to Lawrence and its Wakarausa branch, viz., whether the M., K. & T., if it had not otherwise received full indemnity, could select the lands, or the interest therein which had been originally selected by the L., L. & G. Co. But this relinquishment and the certification of the lands to the M., K. & T. Co., and charging the same to that company, relieves the case of any difficulty, and makes it stand the same as if the M., K. & T. Co. had originally selected the lands in question solely for itself. This it was clearly entitled to do if the L., L. & G. did not make any selection for itself or insist on a right of joint selection.

The difference between lands *in place* and *indemnity lands* as to when the right to particular tracts attaches, is now well settled by the judgments of this Court. As to lands *in place*, the title attaches to particular tracts when the map of definite location is filed. As to *indemnity lands*, no title to specific tracts attaches in advance of their selection, and until actual selection they may be disposed by the United States.

Grinnell vs. R. R. Co., 103 U. S., 730.
St. Paul, &c., Co., vs. Winona, &c., Co., 112 U. S., 730, 731.

Cedar Rapids, &c., Co. vs. Herring, 110 U. S., 27.

Kansas Pacific vs. Atchison Co., 112 U. S., 414, 421, construing this same Act of March 3, 1863.

"*The grant to Kansas,*" says the Court in the case last cited, "*gave no title to the indemnity lands in advance of their selection.*"

If, therefore, the L., L. & G. waived any right to a joint selection or relinquished a selection it had made, it was competent to the M., K. & T. or the Secretary of the Interior for it to select these lands as indemnity lands to which it was entitled. And this was just what was done. And who is injured thereby? The M., K. & T. was entitled to 10 sections per mile. Thatwas the grant. Including these lands it has received less than it was entitled to. Both under the Act of 1863 (Sec. 4), by reason of fully completing its road, and under the Act of 1866 (Sec. 3), which, without reference to full prior completion of its *whole* road, gives it ten sections per mile, within the twenty mile limits, whenever ten consecutive miles are completed, the M., K. & T. *has fully earned these lands and is entitled to keep them.*

The withdrawal of these lands in 1863, as within the ten mile limits of the *probable route* of the L., L. & G. road is utterly immaterial and of no effect. In Kansas Pacific vs. Atchison Co., 112 U. S., the Supreme Court expressly decided this point.

So the joint selection for the common benefit of the L., L. & G. and the M., K. & T. companies is, by reason of the relinquishment of the former to the latter, immaterial and of no effect.

So the subsequent failure of the L., L. & G. to complete that part of its road from Leavenworth to Lawrence or the Wakarasa branch, whatever might be its effect, before, or under the forfeiture Act of July 26, 1876 (19 Stats., 101), is immaterial, since such failure cannot effect the M., K. & T. Company or its rights; for, both under the grant of 1863 (Sec. 3, first proviso), and the grant of 1866, the M., K. & T. Company's rights to its lands are in no wise dependent upon the failure of any other company to "complete the whole of its roads and branches." This is so obvious that I shall not further elaborate the point.

THE EQUITY SET UP BY THE U. S. TO INVALIDATE ITS CERTIFICATION, equivalent to a patent of these lands (Fraser vs. O'Connor, 115 U. S., 102, pp. 115, 116) is, not that the M., K. & T. did not earn them, not that it has received these lands in excess of the amount to which it is entitled, but that the L., L. & G. was entitled to select one-half of them; and though it has never earned them, and though Congress has forfeited its right, and hence the lands reverted to the United States, nevertheless, the M., K. & T. Company, although it received the legal title, has no equity to hold it, although it has not received, or otherwise will not receive, the stipulated amount of lands. Are such metaphysical refinements the Government's notion of equity? Are solemn muniments of title made by it, ten years ago, without fraud or mistake, in discharge of its contract obligations, necessary to their performance, and where no injury has resulted to it, of no more worth than this? Let us approach the case by the high-road and not over by-paths; let us not, as Voltaire said of Marivaux, "weigh fly's eggs in scales

of cobwebs;" let us remember the primal, central, controlling fact, that the M., K. & T. built its road, completed it in time, *earned these lands*, and has received, including these, less than its full grant, and the inequity of the decree appealed from appears at once to the judicial judgment.

II.

The M. K. & T. Company had an equitable title to the lands in question under the Act of July 26th, 1866, even if it be viewed as the only Act to whose benefits that Company is entitled.

I have heretofore considered the rights of the parties under the view that the Acts of 1863, 1864 and 1866, being *in pari materia*, did not, as respect the road down the Neosho Valley (*i. e.*, the road between Emporia and Chanute), make two distinct grants, for two different and parallel roads, but only grants for one and the same road.

It seems to me so clear that this is the true construction of the Acts, and that the M., K. & T. was the valid and recognized assignee of the Atchison Company, that I am reluctant to assume that I may be mistaken in this, and to present the case to the Court on the supposition that two separate roads down the Neosho Valley were intended to be aided, and that the Act of 1866 was an original, distinct and independent grant to

the M., K. & T. Company, and that Congress contemplated that "the branch road down the Neosho Valley," described in the Act of 1863 (Sec. 1), should be built by one company or agency, and the road "down the Valley of the Neosho River," described in the Act of 1866 (Sec. 1), should be built by another company or agency.

But as this seems to be the view on which, in good part, at least, his Honor below rested his adverse opinion and decree, it is the duty of counsel to discuss the rights of the M., K. & T. to the lands in suit under the Act of 1866 considered as a grant *de novo* and as the only one to the benefits of which that company became entitled.

This, however, I do briefly:

1. The M. K. & T. *filed a map of definite location* claiming under *all* the Acts, *including the Act of 1866.*

Record, pp. 60-62, 65.

2. *The Governor certified* to completion of the road of the M., K. & T. under all the Acts, *including the Act of 1866.*

Record, p. 52.

3. *The department twice decided* that the M., K. & T. Co. was entitled to land pursuant to *all* the Acts, *including the Act of 1866*, and against the contention of its adversary (the L., L. & G. Co.) that it (the M., K. & T.) could only claim under the Act of 1866.

Sec'y. BROWNING's decision, Record, p. 65.
Com. WILSON's decision, Record, p. 71.

4. *The selections* by the M., K. & T. of the lands in

suit were made *under the Act of 1866*, as well as under the Acts of 1863.

Record, p. 35.

5. These selections were *approved, and certified* to the State for the M., K. & T. Company, but the certificate stated that this was done "in accordance with the requirements of the Act of March 3, 1863," saying nothing about the Act of July 26, 1866.

Record, p. 58.

6. The L., L. & G. Company relinquished any conflicting or competing right which it had to these lands to the M., K. & T. Company, and requested patents to issue to it.

Record, p. 46; pp. 53–58.

NOW, CONCEDING FOR THE ARGUMENT, that the Act of 1866 was a new and distinct grant for an entirely different road from the one intended to be aided by the Act of 1863: why, upon these facts and upon the Acts, did not the M., K. & T. have a complete and equitable title to the lands in question, which were situate within its indemnity limits. It would have the legal title but for the circumstance that the Act of 1866 (Sec. 3) required a *patent* to issue instead of a *certificate* or *list*.

The fact that these lands had been withdrawn in 1863 for the L., L. & G. Co., upon the filing of the map of its *probable route*, was of no consequence since the map of *definite route* of the road of that company and of the M., K. & T. Company showed that these lands were outside of the granted, but within the indemnity, limits of both roads. *They were, therefore, open to selection* by the M., K. & T. Company as indemnity

lands under the Act of 1866. At most, only the L., L. & G. Co. could claim (if at all) that it would have a right to select half of those lands, and this right it relinquished in favor of the M., K. & T. Company, which received and was accordingly charged with the full amount of them.

THE OPINION OF HIS HONOR BELOW says:

"The evidence does not satisfy him that the lands in question were ever selected as indemnity lands under the Act of 1866, but rather indicates the contrary."

But the instrument of selection expressly states that they were selected by the M., K. & T. both under the Acts of 1863 and 1866.

Record, p. 35.

The Opinion of the Court below against the validity of the selection under the Act of 1866 seems to be based upon the fact that "the Commissioner of the General Land Office recognized the claim under the Act of 1863 alone, and *certified* the lands to the State" under that Act, and did not *patent* them to the Company as required by the Act of 1866.

The selections were complete and formal in every respect—in full compliance, as the record shows, with the regulations of the department in such cases; and the equitable right was perfect upon such selections being made and approved.

St. Paul, &c., R. R. vs. Winona, &c., R. R., 112 U. S., 730, 731, and cases cited.

The Commissioner in submitting the selections thus made under all of the Acts, to the Secretary of the Interior, said he did it under the Act of 1863. This he did because they were *odd* sections nearest the

granted sections, and so under the decision of Secretary BROWNING, in 1867, and of Commissioner WILSON, in 1870 (made in the interest of the United States to prevent a double grant for the same mileage of road) "they charged the grant of 1866 [*i. e.*, charged the M., K. & T. Co.] with all the lands in *odd* sections found vacant and inuring under the grant of 1863."

Record, p. 72.

As the Act of 1863 did not require a *patent*, the Office *certified* the lands, and stated therein that it did it under the Act of 1863.

The record shows that with these lands the grant in favor of the M., K. & T. is not full. And stoutly denying that the Commissioner or Secretary made in the certification any mistake in the Act, yet if this were so, it is confidently submitted that it constitutes no ground of equity for the decree which was rendered (Record, p. 99), adjudging the certification to be void, canceling the same, and decreeing "that the defendant has no right or title in law or *in equity* to said lands, and perpetually enjoining it from setting up any claim or title, either in law or *in equity*, in or to any of said lands."

Record, p. 99.

HIS HONOR BELOW frankly said that the question of the equitable right of the M., K. & T. Co. under the Act of 1866 was "the most doubtful and embarrassing one which the case presented," and admitted that he reached his "conclusion slowly and hesitatingly."

It is apparent that the able and learned Judge's embarrassment and difficulty came from the fundamental error of regarding the Acts of 1863 and 1866, as respects the road down the Neosho Valley, as making

separate grants for two separate roads, and that with this error eliminated, the right of the M., K. & T. under the facts, both in law and equity, to the lands in suit, is plain and free from substantial doubt.

BUT THE FELICITY OF THE APPELLANT'S CASE lies in the fact that the decree below is equally erroneous, whether the Acts be considered as separate and distinct, or as *one*. If the Act of 1863 be treated as an independent Act, in aid of another road, then it might have been regarded as *an appropriation of the lands* IN PLACE, but the *indemnity* lands are acquired by selection, and if the same lands fall within the indemnity limits of several grants, the first to select gets the title. So that inasmuch as there was no selection of these lands by the Atchison Company, the M., K. & T. is entitled to them by virtue of its selection under the Act of 1866, even upon the theory of two separate grants. Every argument to show that the *granted* lands were so appropriated by the Act of 1863, as not to pass by the Act of 1866, only strengthens the M.; K. & T. Co.'s claim to the *indemnity* lands earned and *selected* under the latter Act, because it tends to show its loss of lands in place and thus to establish its right to indemnity. His Honor was, I think, misled to his conclusion by not clearly apprehending what is necessary to a selection of *indemnity lands*. He assumes that the selection must be *by* the Secretary of the Interior, and seems to think that there was no selection under the Act of 1866, because the lands were certified to the State by the Commissioner G. L. O. under the Act of 1863. He seems also not to have correctly apprehended the facts concerning the quantity of land received by the M., K. & T. under all the acts.

III.

These lands were excepted from the Forfeiture Act of July 24, 1876 (19 Stats., 101) and the title thereto in the defendant company impliedly confirmed,

On July 24, 1876 (19 Stats., 101), Congress passed an act forfeiting all lands granted for the L. L. & G. Road; by the Act of March 3, 1863:

"Which have not been patented to said railroad company by the United States under said grant, or earned by the completion of said road, and to which said company are not lawfully entitled" (19 Stats., 101).

1. These lands having been certified (equivalent to a patent) in 1873, this act excepted them from the forfeiture, and was an implied confirmation of the title.

2. The L., L. & G. Road, as well as the M., K. & T. Road, having been completed opposite these lands, these lands were "earned" within the meaning of the forfeiture Act of 1876, and the L., L. & G. Company's title was excepted from the forfeiture and impliedly confirmed.

IV.

The decree below ought to be reversed on the general principles of equity jurisprudence: no injury, want of equity, laches, inability to do equity.

Let us, in conclusion, briefly consider the rights of

the M., K. & T. Co. to the lands in suit, in the light of the general principles of equity jurisprudence :

It completed the road in question, and completed it in time, and the Governor so certifies. This is the central, all-controlling fact. It, therefore, earned and is entitled to ten sections of land per mile for every mile of road so completed. If it cannot get this quantity in the granted limits, it is entitled under the Act of 1866, to get it from any "public lands of the United States," whether odd or even sections within the 20-mile limits, first exhausting, under the Act of 1863 (as held by the Department), the *odd* sections before going to the *even* sections. On this basis the grant was long ago adjusted, and pursuant thereto the lands in question were, in 1873, certified to the State for the benefit of the M., K. & T. Company.

The United States by this Bill seeks to set aside that certification. And not only this was decreed, but it was also decreed that the defendant had no claim in law or equity to the lands.

As these lands were within the indemnity lands, any possible equity to such relief must rest upon the proposition that by some fraud or mistake of fact or of law, the M., K. & T. Company has received, including these lands, more lands than it had earned—more than it was lawfully entitled to— more than it has in conscience the right to keep. The Attorney-General felt the force of this and, accordingly, made an allegation to this effect (Record, folio 9); attempted to prove it and failed (Record, p. 31); and the defendant affirmatively disproved it (Record, pp. 68, 69).

Suppose that by reason of the failure of the L., L. & G. to complete the north end of its road from Leaven-

worth to Lawrence, and to build the Wakarusa branch, it ceased to have any right to indemnity lands —that had no right to relinquish in 1872 its selections of such lands to the M., K. & T. Co., and that the latter company could not, under the Acts, receive the interest thus relinquished as part of its indemnity (all of which suppositions are untenable, but granting them for the argument), then what are the equities as between the United States and the M., K. & T. Co. (under which the defendant claims) as to the lands described in the Bill. These were certified to the State for the M., K. & T. Company, and charged by the Land Department to its account.

The United States now seeks to set aside that certification and to undo what was then done, on account of the effect of the subsequent failure on the part of the L., L. & G. to complete part of its road. The lands in question were taken and received by the M., K. & T. as part of its indemnity; and the real question in a Court of Equity is, and must be, *whether the M., K. & T. has received more lands, including these, than it has earned or is equitably entitled to keep.* The *onus* to establish this is on the United States. Instead of making this proof, it sets up that half of these lands belonged to or were withdrawn or reserved for the L., L. & G. Co., and hence the M., K. & T. had no right to receive them as part of its indemnity even with the consent of the L., L. & G. Company. If this be so, and if the decree below is affirmed, then what is the effect? Simply, that the M., K. & T. is *entitled to have an equal quantity of lands as indemnity elsewhere out of the odd or even sections within the 20-mile limits.* Why set aside its title to the lands in suit, merely to compel to

seek for an equal quantity elsewhere within the same indemnity limits. *Cui bono?* Ten years had elapsed before this suit was brought and meanwhile two important changes in the situation, to which no Court of Equity can close its eyes, have occurred. The lands certified have been dealt with as belonging to the defendant company—mortgaged and sold, doubtless, in the usual manner. Other public lands out of which the M., K. & T. could and would have received indemnity have been sold and disposed of by the United States, so that if the M., K. & T. loses the lands certified in 1873, it is certain as a matter of fact, that it cannot in 1883 or 1886, be put *in statu quo*. Certainly, after this long delay, the burden is on the United States to show that the M., K. & T. Co. or the defendant as its grantee, will not be prejudiced by its laches and acquiescence, with full knowledge of all the facts, should the decree sought be granted.

BECAUSE THE BILL AND PROOFS do not show any *actual injury* to the United States, that is, do not show that the M., K. & T. Co. has received more lands, including these now in suit, than it earned; and because in a Court of Equity the *legal title* will not be disturbed when during long delay and acquiescence the rights of others have attached, based upon the certification of these lands and the *indicia* of title and muniments of ownership thereby evidenced, at least without proof that the parties in interest can be put *in statu quo*, and that the United States has not meanwhile sold the lands to others to which the M., K. & T. Company would be entitled to look for indemnity in the place of those which the decree below causes it to lose.

THE UNITED STATES IN BILLS OF THIS CHARACTER—

"Stand on the same footing with private individuals —must equally present a case by allegation and proof entitling them to equitable relief; all the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him."

Per FIELD J., U. S. vs. Flint, 4 Sawyer, 42, 58; affirmed, 98 U. S., 61. U. S. vs. Burlington & Mo. River R. R., 4 Dillon, 297, decided by MILLER, J.; affirmed 98 U. S., 334. Grinnell vs. R. R. Co., 103 U. S., p. 744.

There may be some question how far *mere* laches may be imputed to the United States, but there can be none that they are subject equally with individuals, to the primordial rules of morality, honesty, good faith, the obligation to do equity before asking it and as a condition of getting it, the necessity of showing injury and reasonable diligence after knowledge of the facts to redress it; which principles applied to this case require the decree below to be reversed and the Bill dismissed.

Jno. F. Dillon
of Counsel for Appt

118-682

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CLERK.

United States Supreme Court.

OCTOBER TERM, 1886.

No. 749.

KANSAS CITY, LAWRENCE and SOUTHERN KANSAS RAILROAD COMPANY,

PLAINTIFF IN ERROR,

v.

BENJAMIN HARRIS BREWSTER, Attorney-General, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY TO BRIEF BY ATTORNEY-GENERAL.

GEO. W. McCRARY,
A. T. BRITTON,
JAMES HAGERMAN,
A. B. BROWNE.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1886.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE & SOUTHERN KANSAS RAILROAD COMPANY, APPELLANT,

v.

BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL, &c.

No. 749.

Appeal from the Circuit Court of the United States for the District of Kansas.

BRIEF FOR APPELLANT IN REPLY TO THE ATTORNEY-GENERAL.

I.

The assignment from the A., T. & S. F. R. Co. to the M., K. & T. R'y Co. amounted to notice by the former that it did not propose to execute its acceptance of the grant of 1863 for the Neosho Branch Railroad. It was by necessary inference a declination of the proffered aid by the Atchison Company, and a transfer of its right thereto to the M., K. & T., subject perhaps to the ratification thereof by the Legislature, which was afterwards obtained.

II.

We need add little to what is said in our opening brief in support of the proposition, that the acts of 1863 and 1866 were never intended to give aid to two distinct lines of railroad along the same route down the Neosho Valley. We submit, however, that if a theory so untenable could be maintained it would but confirm the claim of the M., K. & T. to the indemnity lands here in controversy. For if the dual grant theory be true, or if, as the Attorney-General alternatively argues, the grant of 1866 repealed that of 1863, then clearly the equitable title of the respondent under the act of 1866 is absolutely perfect.

Besides if these are treated as two different grants to two different companies, requiring construction of two roads to earn both, then the A., T. & S. F. never located its road down the Neosho Valley, and has never identified any lands to which its grant would attach. If the Government has granted the same lands to both Companies, it is in no position to set up one of its grants against the other. If the A., T. & S. F. does not complain no one else can.

A repeal by implication will not, however, be favored, and the two acts will be allowed to stand as *in pari materia* and be construed together if possible.

Cooper *v.* Telfair, 4 Dall., 14.
1 Sug. on Powers, 105.
U. S. *v.* Telford, 11 Wall., 95.
Fowler *v.* Perkins, 77 Ill., 271.
Mitchell *v.* Orphan Asylum, 9 Cow., 437.

III.

This Court does not hold in Missouri R'y Co. *v.* Kansas Pacific R'y Co. (97 U. S., 499) that the act of 1864 was

repealed by that of 1866, but only that it was never accepted by the State, and nothing was done under it until after the passage of the act of 1866, which was a more valuable grant covering the same lands. The Court, it is true, say that this larger and more valuable grant *superseded* the grant of 1864, but whether by absolute repeal or by reason of its being a supplementary act covering, in large part, the same subject-matter is not considered.

IV.

The second and third propositions of the Attorney-General, set forth on pages 9, 10, and 11 of his brief, are anticipated and fully discussed in our opening brief.

V.

It is insisted that our title under the act of 1863 fails because it appears that *all* the lines and branches designated by that act have not been constructed, and it is contended that under Sec. 4 of that act the construction of all said lines and branches was made a condition precedent to the certification of any lands thereunder as indemnity.

While this question is not a material one in this case, it is one of such vast moment, affecting as it does the title to more than a million of acres of land in Kansas alone, that we feel bound to notice it; and we answer the contention of the Attorney-General as follows:

1. *The act of* 1863 *was rightly construed by the Land Department as making a grant of lands to aid in the construction of the designated lines and branches SEVERALLY, and not jointly or collectively.* (*St. Paul R.R.* v. *Winona Railroad*, 112 *U. S., p.* 720.) See opening brief, page 25.

This appears clearly from several provisions of the act, and among others the following:

The first section makes *a grant to the State* to aid in the construction of two main lines and two branches which are separately designated as the lines to be aided, and the first proviso distinctly declares that the lands are "granted "for and on account of said roads and branches SEVERALLY."

The third section gives to the Legislature full power to dispose of the lands granted, and in the exercise of that power the Legislature conferred the grant for one of the lines and one of the branches upon the L., L. & G. Company; that for another line upon the A., T. & S. F., and that for the Neosho Valley Branch upon the M., K. & T. There can be no doubt of the power of the Legislature to make this disposition, and it therefore follows, if the construction contended for by the Attorney-General was adopted, that *one of these lawful beneficiaries could be held responsible for the default of another beneficiary over which it had no control.*

This would be equally true upon the theory contended for by the Attorney-General, that the grant of 1863 provided only for two systems of roads. The default of one would be equally fatal to the other without power of prevention.

The repeated use of the phrase, "roads *or* branches," found in the act is strongly corroborative of this view.

2. *This act, like many other similar grants, has been construed and administered upon* the *theory that it was to aid the designated roads and branches severally, and this construction has been acquiesced in and acted upon by the Government and the public for many years, and vested rights having long since been acquired on the faith of it it is now too late to attack it.* The question was at least one of doubt, and in such a case "*this uniform action is as potent*-"*tial and as conclusive of the soundness of the construction* "*as if it had been declared by judicial decision. It cannot* "*at this day be called in question.*"

United States *v.* B. & M. R.R. Co., 98 U. S., 334.
United States *v.* McDaniel, 7 Pet., 1, 14.
United States *v.* Graham, 110 U. S., 219.

3. The lands having been selected and certified as indemnity under the act of 1863, the title of the State and of its grantees cannot be divested "*except through judi-*" *cial proceedings instituted under authority of law for that* "*purpose.*"

Schulenberg *v.* Harriman, 21 Wall., 44.
Farnsworth *v.* R. Co., 92 U. S., 49–66.
McMicken *v.* U. S., 97 U. S., 217–218.
Van Wyck *v.* Knevals, 106 U. S., 106.
St. Louis, &c., R. Co. *v.* McGee, 115 U. S., 469.

The act of 1863 vested absolute title in the State, subject to identification of the particular tracts by definite location as to lands in place and by subsequent selection as to indemnity lands. The title having thus been vested as to the lands in controversy, all limitations in the law went only to the subsequent application of the lands to the purposes of construction, and were simply conditions subsequent to be enforced by the United States in a prescribed manner. As was held in Schulenburg *v.* Harriman, *supra*, the prohibition against further sales after expiration of the statutory term for completing the road added nothing to the strength of the provision for reversion of the unsold lands, as neither became operative unless the remedy of the grantor for breach of condition subsequent was enforced. And this is not at all changed because in present case the restriction upon sales of indemnity lands commenced with construction of "any" twenty-mile section, because at expiration of ten years without completion of the whole of said roads and branches both granted and in-

demnity lands are merged in a common prohibition against further sales. Whether the State had diverted the trust fund, or had prematurely disposed of it, or had not seasonably constructed, are equally conditions subsequent.

The lands in controversy, therefore, fall within the rule in the cases cited above, wherein it was settled that the remedy of the United States for breaches of conditions subsequent must be by legislative declaration or by judicial proceedings *expressly authorized by legislative enactment.* In other words, it is for Congress to determine whether the United States will take advantage of the conditions broken; and until Congress has so elected and prescribed the mode of remedy, a suit to enforce forfeiture is not maintainable at the instance of the Executive Department. Hence this suit must fail if put upon the ground of the prohibition against sales of indemnity lands, because such a suit would be simply an attempted enforcement of the remedy by the United States upon breach of conditions subsequent without express authority to that end from Congress.

4. Congress, by the act of July 26, 1876, (Statement, p. 35,) declared its will as to the forfeiture which should be enforced for non-construction of the *whole* of the roads and branches in question, and it therein has by plain and necessary implication affirmed the title of the State and its grantees to all lands not declared forfeited to the United States. The forfeiture is declared to apply only to "lands "which have not been patented to said railroad company "(the L., L. & G.) by the United States under said grant, "or earned by the completion of said road, and to which "said company are not lawfully entitled." If the theory of the Attorney-General be correct, Congress might have declared a forfeiture of all the indemnity lands previously certified under the act of 1863. By declaring a forfeiture

only of a part of the grant, Congress manifestly intended to confirm the title to all the lands not embraced within the terms of the forfeiture.

We have thus stated our views upon this question because of the vast interests that would be affected either by a decision or an intimation of this Court sustaining the contention of the Attorney-General, but we desire to repeat that even if it were true that the M., K. & T. took nothing under the act of 1863, the fact would only tend to confirm its equitable title under the act of 1866.

VI.

The provisions for indemnity under the acts of 1863 and 1866 are substantially the same. The lands for which indemnity was given under both acts are described in identically the same words, as lands that the United States have "sold," or to which "the right of pre-emption or home-"stead settlement has attached," or which "have been re-"served by the United States for any purpose whatever," or which were "otherwise appropriated." True, the act of 1866 gave indemnity in both odd and even sections, *but as to the odd sections in controversy here the two acts are identical.*

As the selections were made under the act of 1866 and duly approved, the presumption is that they were the sections nearest to the lands in place, and there is nothing in the claim that defendant was bound to prove that the fact was so by other evidence, or, in other words, that the officers of the land department did their duty.

VII.

It is not true that the indemnity under the act of 1863 would have been much greater in amount than under the act of 1866. The grant was the same quantity per mile under both acts. The reservations and exceptions were iden-

tical in both. It is now finally settled that this indemnity clause covers losses from the grant previous to the date of the act, as well as between that date and the final determination of the route of the road.

Winona, &c., R.R. Co. v. *Burney*, 113 *U. S.*, 618.

VIII.

It is not true that there is proof in the record that the M., K. & T. has, outside of and in addition to the lands in controversy, received more land than it has earned. The contrary is the fact, as shown in our opening brief. The Attorney-General now attempts to sustain his contention upon this subject by claiming that some of the lands covered by the grant of 1866 had been previously granted to the Union Pacific & A., T. & S. F. Railroads.

And by *assuming* that the M., K. & T. was not entitled to indemnity for such lands he reaches the conclusion that said Company was only entitled to 563,200 acres, all told, and that they had, according to the proofs, received nearly 700,000 acres.

In the first place there is no evidence to show what lands the Union Pacific and A., T. & S. F. took under their grants within the limits of the grant of 1866. In the second place there is no warrant for the assertion that the M., K. & T. was not entitled to indemnity for lands previously granted to another company.

We have examined the cases cited by the Attorney-General on this point, and we submit that not one of them holds or intimates the doctrine contended for. It is too clear for argument that lands granted to the Union Pacific or A., T. & S. F. by acts of Congress, prior to the passage of the act of 1866, were lands reserved or otherwise appropriated by the United States for the purpose of aiding those roads, and for which, therefore, the M., K. & T. was entitled to indemnity. The proviso to the

first section of the act of 1866 does not affect the question. It excludes from the *granted* lands all lands theretofore reserved *to the United States* by any act of Congress, &c. The lands granted to aid in the construction of the railroads named were not reserved "to the United States." Besides, if they had been it would not have affected the question of the right to indemnity.

But if the Attorney-General is correct as to these exceptions, and accepting his statement that our grant properly embraced but 563,000 acres, his conclusion that we had received an excess thereunder at time the selections here in question were made would be erroneous. That Company has never received, under *both* grants of lands in place, but 178,830 acres.

Record, pp. 69–70.

Thus leaving due on the Attorney-General's theory as indemnity some 384,377 acres. Of this amount, and prior to the date of the certification of the lands here in suit, but 186,300 acres had been certified or patented in satisfaction of this deficiency. *Hence, on April* 19, 1873, *when these lands were certified there was still due* 198,077 *acres of indemnity to compensate such deficiency on the Attorney-General's own basis of computation.*

Even if it were shown that the M., K. & T. had obtained lands in excess of its grant, this Court would not cancel the patents without proof sufficient to identify the particular lands which were certified or patented in excess of the limit. (*The U. S.* v. *B. & M. R.R. Co.*, 98 *U. S.*, 334.) It is not pretended that there is any such proof here.

Respectfully submitted.

GEO. W. McCRARY,
A. T. BRITTON,
JAMES HAGERMAN,
A. B. BROWNE.

118-682

Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE and Southern Kansas Railroad Company
vs.
BENJAMIN HARRIS BREWSTER, Attorney-General, &c.
} No. 1147.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT FOR THE UNITED STATES.

WILLIAM LAWRENCE, of counsel, representing settlers.

sake of brevity, called the "L., L. and G. Co.," the name of which has since been changed to that of *the Kansas City, Lawrence and Southern Kansas Railroad Company.*

II. *February* 11, 1859, the Territorial legislature also incorporated *the Atchison, Topeka and Santa Fé Railroad Company* as a corporation.

III. *September* 20, 1865, a railway company was organized under the general corporation statute of Kansas, with the name of the "Union Pacific Railway Company, Southern Branch," since changed to the "Missouri, Kansas and Texas Railway Company."

These corporations have continued since their respective organizations and are now *all existing*, and with *main* lines of road constructed and in operation, the particular *location* of which, as indicated on the map of Kansas, it is material to notice.

THE PURPOSE OF LAND-GRANT AID BY CONGRESS.

In 1862, when only the first two corporations were in existence, Congress considered the subject of aiding the construction of each by a land grant. One object of Congress was to aid the L., L. and G. Co., in constructing a line of road from Leavenworth, by way of Lawrence and the Ohio City crossing of the Osage River, to the south line of the State in the direction of Galveston, with a branch (as *changed* by Act of July 1, 1864; 13 Stat., 339; respondent's proofs, 26), from Lawrence to Emporia.

Another object of Congress was to aid the A., T. and S. F. Co. to construct a road from Atchison, *via* Topeka and Emporia, to the west line of the State in the direction of

Santa Fé, with a branch from Emporia down the Neosho Valley to connect with the L., L. and G. road where it entered the Neosho Valley on the *northeast* side of the river.

Accordingly Congress passed the Act of March 3, 1863, making a land grant to aid the construction of these two roads and branches, and giving ten years' time to make them.

Congress evidently contemplated that the L., L. and G. road would at some time be extended on to Galveston, Tex., and that the A., T. and S. F. would eventually extend to Santa Fé.

The *branches* were for local and public convenience, in connection with the respective roads, as a part thereof, under the management of the proper corporation.

LAND GRANT FOR M., K. & T. CO.

The Union Pacific Railroad Co., Southern Branch (now M., K. and T. Co.), having been subsequently organized, September 20, 1865, Congress considered the propriety of making a land grant in its favor as a separate, distinct, long line of road, commencing at Fort Riley, in a different part of the State, running "down the Neosho Valley to the southern line of the State with a view to an extension of the same, through a portion of the Indian Territory to Fort Smith, Arkansas." The purpose to secure the extension through the Indian Territory and into Arkansas is further shown by sections 8, 9, and 10 of said act.

The law did not *require* this road to pass through *Emporia*, or to cross or *connect* with the L., L. and G. road. It contemplated a distinct line; that *portion* of it, south-

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ward of Emporia to the extent of the length of the Emporia branch of the A., T. and S. F. Co., would run in the same valley, but not necessarily in the same general direction.

THREE DISTINCT LINES OF ROAD.

Here were three grand lines of road provided for, each company starting from a different point, each having a different destination, each having its object as a through line, with a provision for two branches in no way *interfering* with or *superseding the construction of any main line*, and the construction of neither main line, in any way superseding the *necessity of the branches*. This was the view of Congress, never yet changed by its authority, but with evidence of a refusal of Congress to change the character of the Emporia branch of the A., T. and S. F. road.

The three *main lines* of road have been constructed, and each company has received lands granted "in place" for its main line. The A., T. and S. F. Co. NEVER LOCATED the *Emporia branch* (Record, 30, 31); none of the *branches* were ever *located* or constructed by any company. The main line of the M., K. and T. road does NOT pass from Emporia "to the POINT" where the L., L. and G. road "ENTERS the said Neosho Valley" (printed Record, p. 23 [38]) on the NORTHEAST SIDE of the Neosho River [at Colony or Divide], but it crosses the L., L. and G. road AT CHANUTE, about *twenty-eight miles farther south*, and on the *opposite side* of the river, where the L., L. and G. road EMERGES from the Neosho Valley.

THE LOCATION OF LANDS IN CONTROVERSY.

The M., K. and T. road and the L., L. and G. road are so *constructed* that *the twenty-mile indemnity limits* of the two roads *overlap* in Allen County.

May 19, 1873, the governor of Kansas patented the odd sections in this *overlap* (27,732.50 acres) to the M., K. and T. Co. as *indemnity lands earned by said company under the Act of March* 3, 1863, but the lands were NEVER SELECTED BY THE SECRETARY OF THE INTERIOR, as such, as *required by said Act of March* 3, 1863, *and by the Act of July* 26, 1866. There is a pretense of claim that he approved a selection *under the Act of* 1863. The M., K. and T. Co. having released these lands to the L., L. and G. Co., the defendant herein, it claims to be the owner.

The United States denies this claim, and by the bill in this case asks that said patent be annulled and the defendant be enjoined from setting up any claim to said lands.

NO OBJECTION CAN BE TAKEN TO THE FORM OF THE BILL.

Though the bill might have been in the name of the *United States*, no objection can be taken to it in its present form. (*Benton* v. *Woolsey et al.*, 12 Peters, 31; *U. S.* v. *Hughes*, 11 How., 552; *Story Eq. Pl.*, 8, 49; *Edwards on Parties in Equity*, 60; *State* v. *V. and N. R. R. Co.*, 51 Miss., 365.)

SOME OF THE STATUTES TO BE CONSIDERED.

For the sake of convenience, and before discussing in detail the several questions arising in this case, some pro-

visions of statutes, with comments thereon, are presented as follows:

LAND-GRANT AID TO L., L. AND G. AND A., T. AND S. F. —ITS OBJECTS.

March 3, 1863, when *only the first two named corporations* were in existence, Congress passed an act (12 Stats., 772), by which it is declared that "there is hereby granted to the State of Kansas" certain lands hereafter described, "for the purpose of aiding in the construction" of said two railroads and branches thereof, to wit:

> *First*, of a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and *via* the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, WITH A BRANCH from Lawrence, by the valley of the Wakarusa River, to the point on the Atchison, Topeka and Santa Fé Railroad where said road intersects the Neosho River.
>
> *Second*, of a railroad from the city of Atchison *via* Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, WITH A BRANCH *from where the last-named road crosses the Neosho* (Emporia) DOWN SAID NEOSHO VALLEY TO THE POINT *where the said first-named road* ENTERS *the said Neosho Valley.*

The A., T. AND S. F. ROAD, running in a southwesterly direction, crosses the Neosho River and Valley at EMPORIA, while the L., L. AND G. ROAD, running in a southerly direction, "ENTERS said Neosho Valley," a distance of some —— miles southeast of Emporia, as is claimed, at or near the town of COLONY, or the point

called the "DIVIDE." (Printed Record, 23 [38].) But *wherever* said ROAD enters the valley, its STARTING POINT *and* DIRECTION, require it to "enter the valley" ON THE NORTHEAST SIDE OF THE RIVER. This is as *absolutely certain* as if the act of Congress had so declared *in express terms*. It *could not* otherwise enter it

A BRANCH TO CONNECT THE TWO ROADS.

Congress *saw the necessity* of a *branch connecting* EMPORIA and the point of entry in the valley by the L., L. AND G. ROAD, and accordingly made the land grant to the State of Kansas in aid of a main line of road WITH A BRANCH FROM EMPORIA to make the *connection* stated, *between* THE TWO ROADS NAMED, and under the control of the proper company named.

LANDS ALONG THE BRANCH CAN BE USED ONLY TO MAKE IT.

And to *secure these objects* beyond all dispute the same act of Congress declares:

> That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof FOR THE PURPOSE AFORESAID, AND NO OTHER; and the SAID railroads AND BRANCHES shall be and remain public highways, for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States. (Sec. 3.)

And the same act, in section one, after making the grant of lands, and providing for indemnity lands, says:

> *Which* lands [including *both* lands in place and indemnity] thus indicated by *odd* numbers, and se-

lected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas FOR THE USE AND PURPOSE AFORESAID: *Provided further*, That the lands hereby granted for and on account of said road and branches SEVERALLY shall be exclusively applied in the construction of the SAME, and for NO OTHER PURPOSE whatever, and shall be disposed of only as THE WORK progresses through the same, as in this act hereinafter provided.

February 9, 1864, the legislature of Kansas passed an act accepting the grant made by the act of Congress of March 3, 1863. (Gen. Stats. of Kan., 85.)

It provides, among other things, that—

SEC. 3. In consideration that the Atchison, Topeka and Santa Fé Railroad Company (formerly the Atchison and Topeka Railroad Company) [*but no other company, expressio unius*, &c.,] SHALL CONSTRUCT A RAILROAD from the city of Atchison via Topeka, to the western line of said State, in the direction of Fort Union and Santa Fé, New Mexico, WITH A BRANCH *from where said road crosses the Neosho, down said Neosho Valley to the point where the Leavenworth, Lawrence and Fort Gibson Railroad enters said Neosho Valley*, the State of Kansas hereby agrees to grant, bargain, and sell to said Atchison, Topeka and Santa Fé Railroad Company all that portion of the lands granted to this State by the above-named act of Congress applicable to the construction of the hereinabove described railroad and branch thereof, and which shall be selected and located in conformity with the provisions of the above-named act of Congress.

* * * * *

Provided however, That said agreement for the sale of said lands, and all conveyances thereof, shall

be for the uses and purposes, and subject to the conditions, reversions, and provisions set forth and contained in said act of Congress and in this act.

This requires, as the *act of Congress* requires:

I. A *trunk* line of road "with a branch."

II. That the *branch* shall *connect Emporia* with the *proper point* on the *northeast side* of the Neosho River, and shall connect *the two* roads.

III. That said *branch* shall be operated *by said company* as a part of its system of road as "a public highway for *the use of the Government*," and as a common carrier for the public.

NO R. R. CO. BUT THE A., T. AND S. F. CAN LOCATE THE BRANCH.

The act of Congress also requires said A., T. and S. F. Co., *and no other*, to *locate*, not only its line of road, but *also said branch*, and file a map of definite location in the General Land Office.

Thus, the Act of March 3, 1863, makes a grant of land for a *main line* of road *with a branch*, and requires the R. R. Co. to *fix the line of location of each*. This it does by making it "the duty of the Secretary of the Interior to cause to be selected" indemnity lands—

> *In case it shall appear that the United States have, WHEN THE LINES OR ROUTES OF SAID ROAD AND BRANCHES ARE DEFINITELY FIXED, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever.*

And again it is—

> *Provided*, That the [indemnity] land to be so selected shall, in no case, be located further than TWENTY MILES FROM THE LINES OF SAID ROAD AND BRANCHES.

The Supreme Court has decided that—

> The act which fixes the *time* of *definite location*, is the act of filing the map or plat of the line in the Office of the Commissioner of the General Land Office. * * * Up to that time the right of the company to no definite section or part of section [of land granted in place] is fixed. * * * The right of the company becomes by that act vested. * * * IT IS AN ACT TO BE DONE BY THE COMPANY. (*Kansas Pacific R. R. Co.* vs. *Dunmeyer*, 113 U. S., 634.)

This necessarily means *the company* in whose favor the grant is made, and *no other*.

In *Van Wycke* vs. *Knevals* (106 U. S., 366), the Supreme Court said:

> The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such route "as it may deem best after an examination of the ground has disclosed the feasibility and advantages of different lines." But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior, and accepted by that officer, the route is established. It is, in the language of the act, "definitely fixed," *and cannot be the subject of future change, so as to affect the grant*, EXCEPT UPON THE LEGISLATIVE CONSENT. (See *K. P. Co.* vs. *Dunmeyer*, 113 U. S., 629.)

THE LANDS GRANTED "IN PLACE."

The lands so granted to the State are described in the act as:

> Every alternate section of land designated by odd numbers (1, 3, 5, 7, &c.) for ten sections in width (10 miles) on each side of SAID ROAD and each of ITS BRANCHES.

Section 4 of the act provides the machinery by which the lands granted "IN PLACE" are to be awarded to the State of Kansas, as follows:

> When the Governor of said State shall certify to the Secretary of the Interior that any twenty consecutive miles of either of said *roads* or *branches* is completed, * * * and the said Secretary shall be satisfied that said State has complied in good faith with the requirement, the State may cause to be sold [grant to the proper railroad company] all the lands granted as aforesaid situated opposite to and within a limit of ten miles of the line of said section of road thus completed.

As other sections of twenty miles might be completed, the right to lands would become perfect. The usage in this and all similar grants has been for the Secretary of the Interior to certify to the Governor of Kansas *lists* of land so earned, and the Governor thereupon issued patents to the proper railroad company.

INDEMNITY LANDS AND HOW SELECTED.

The Act of March 3, 1863, provides for "*indemnity*" or "*lien*" lands, and *declares what officer alone* shall cause *them to be selected*, as follows:

> But in case it shall appear that the United States have, when the lines or routes of said road and

branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the DUTY OF THE SECRETARY OF THE INTERIOR TO CAUSE TO BE SELECTED FOR THE PURPOSE AFORESAID, from the public lands of *the United States* nearest to tiers of sections above specified, so much land in alternate sections or parts of sections, *designated by odd numbers*, as shall be equal to such lands as the United States have sold, RESERVED, or otherwise appropriated, or to which the right of pre-emption or homestead settlement have attached as aforesaid. * * * *Provided*, That the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches.

These are the "*indemnity*" odd sections, *between* lines ten and twenty miles from the respective lines of road, generally called the "twenty-mile limits," or, "indemnity limits."

The mode and time of selecting "indemnity" lands are equally provided for by the act of 1863, as follows:

And when the Governor of said State shall so certify, and the Secretary of the Interior shall be satisfied, that the WHOLE OF SAID ROADS AND BRANCHES AND TELEGRAPH are completed in good, substantial, and workmanlike manner as first-class railroads and telegraph, the said State may cause to be sold [granted to the railroad companies] all the remaining [the indemnity] lands granted and *selected* for the purpose indicated in this act situated within the said limits of twenty miles, &c.

THE L., L. AND G. CO. NEVER EARNED ANY INDEMNITY LANDS.

This was conceded in the argument for the defendant in the circuit court. (Brief, p. 271.)

The Act of March 3, 1863, provides:

> That if *any* part of said road and *branches* is not completed within ten years from the passage of this act, no further sale [that is, grant to the railroad company] shall be made, and all the lands unsold [not granted to the company] shall revert to the United States.

The L., L. and G. Co. commenced to make a PORTION of the *main line* of road, and received lands within the ten-mile limits for sections of 20 miles of road as completed.

On the 21st of September, 1871, the Governor of Kansas made a certificate to the Secretary of the Interior, showing—

> That the map or plat of the railroad of the L., L. and G. R. R. Co. has been duly filed in my office by said L., L. and G. R. R. Co. and shows THAT PORTION of said railroad commencing at Lawrence [not at Leavenworth, as required], Kansas, and ending at the south line of the State of Kansas, in the direction of Galveston Bay, in Texas, *which* has been completed and equipped as required by the act of Congress approved March 3, 1863.

The L., L. and G. R. R. Co. *never earned* or *received*, and is not entitled to, any part of the *indemnity lands*, because it did not complete all of its main line of road and it did not make any *branch*.

The Commissioner of the General Land Office so determined by his decision of October 8, 1874, and the L., L. and G. Co. waived an appeal. (Printed Record, p. 33 [59].)

Again, in his letter of May 2, 1878, to the Secretary of the Interior, in relation to these lands, he says:

> It has been fully determined that the L., L. and G. R. R. Co. is not entitled to any lands *in its indemnity limits.*

In view of all this, Congress passed the Act of July 24, 1876 (19 Stats., 101), as folllows:

> An act to declare forfeited to the United States certain lands granted to the State of Kansas in aid of the construction of railroads, by act of Congress approved March 3, 1863.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all lands which were granted by act of Congress approved March 3, 1863, to the State of Kansas, to aid in the construction of a railroad commencing at Leavenworth, Kansas, and running, by way of the town of Lawrence and the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence, by the way of the Wakarusa River to a point on the Atchison, Topeka and Santa Fé Railroad where said road intersects the Neosho River, and which have not been patented to said railroad company by the United States under said grant, or earned by the completion of said road, and to which said company are not lawfully entitled, are hereby declared forfeited to the United States, and shall hereafter be subject to entry only under the provisions of the homestead laws of the United States.
>
> Approved July 24, 1876.

This act was in fact, as a matter of history, passed, among other purpose with a view to secure for settlers the *iden-*

tical lands now in question. It applies by its very terms to said lands. But it is well settled that the *court* may decree a forfeiture of land grant and indemnity rights. This act is cited merely as an evidence of the purpose of Congress as to *these* lands, and of its judgment as to the necessity and justice of a forfeiture.

THE LANDS NOW IN DISPUTE.

The lands *now in dispute* lie in Allen County, *outside of the ten-mile limits* but *within the* overlapping *indemnity limits* of the L., L. and G. Co. and the M., K. and T. Co. It is certain, therefore, that said first named company has no title to these lands in right of any valid claim to indemnity lands. And it will be shown that the latter company is equally without any legal or equitable claim.

THE R. R. COMPANIES BY THEIR ACTS ADMIT TITLE DOUBTFUL.

Yet as showing the manner in which this land grant has been administered, and the mode in which the defendant sought to obtain *some color of title*, and as evidence of its own distrust of title from *other sources*, reference is made to "respondent's proofs," pp. 60–66, 69, and 70–76, which show:

I. *February* 20, 1871, the L., L. and G. Co. and the M., K. and T. Co. agreed on a basis of partition of lands, including those in controversy, although it is now conceded the L., L. and G. Co. never had any legal claim thereto.

II. *October* 9, 1871, the M. K., and T. Co., "in pursuance of said agreement and * * * of one dollar," released to the L., L. and G. Co. these lands.

III. *February* 28, 1872, the M., K. and T. Co. made another release.

IV. *August* 8, 1872, the L., L. and G. Co., *claiming under the Act of March* 3, 1863, united with the M., K. and T. Co., claiming under that act, *and* the Act of July 26, 1866, in *selecting* these lands as indemnity. The Secretary of the Interior *neither authorized* nor *ratified either selection*, and the defendant *admits* (Record, 18, 19) that the L. L., and G. Co. had no right to indemnity lands.

V. *December* 3, 1872, the L., L. and G. Co., "for the purpose of partition," relinquishes these lands to the M., K. and T. Co., with request that patent issue to said latter company.

VI. *May* 19, 1873, the Governor of Kansas issued patent to the M., K. and T. Co., as "entitled under the &ct of March 3, 1863," and *no other* act of Congress.

These various contradictory claims, piled upon the MANIFEST DOUBTS implied in the arrangements and conveyances between the railroad companies, like

"Pelion upon Ossa,"

settle one thing, namely, that the defendant in the court below has *no title in such clear terms* as to satisfy the rules for construing grants already stated. The *contradictory*, multiplied attempts at obtaining some source of title only present a multitude of obstacles to any title; for each separate attempt destroys all others, and creates new difficulties to be surmounted:

"Hills peep o'er hills, and alps on alps arise."

These contradictory attempts breed

"Confusion worse confounded."

It may be well said of them:

"—— Nil fuit unquam
Sic impar sibi."

These contradictory claims give no *clear* evidence of title from any source.

A legal or equitable claim of title is consistent in all its parts. Complicated contradictions do not constitute truth or justice. Attempts to secure rights by indirection generally fail. (*L., L. and G. R. Co.* vs. *U. S.*, 92. U. S., 749, 750.)

The court cannot find a title in any of these railroad companies unless it be possible "to find the meaning of persons who had no meaning at all." (Brackenridge on Trusts, 103.)

"*Ex fumo dare lucem*
Cogitat, ut spaciosa dehinc miracula promat."

THE ONLY LAND AID OR AUTHORITY GIVEN BY CONGRESS TO THE M., K. AND T. R. CO.

The only *land grant* made *by Congress* in aid of the M., K. and T. Co., and the *only right given by Congress* to said company for *indemnity lands* and the *only power* given it *by Congress*, is found in THE ACT OF JULY 26, 1866 (14 Stats., 289), the first section of which provides:

> That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch [now M., K. and T. Co.], the same being a corporation organized under the laws of the State of Kansas, *to construct and* OPERATE *a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through*

a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas for *the use and benefit of said railroad company* every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or *that the same has been* RESERVED by the United States *for any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid from *the public lands of the United States* nearest to the sections above specified so much land as shall be equal to the amount of such land as the United States have sold, *reserved* or *otherwise appropriated*, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary, for the purpose of the construction and operation of said railroad as provided by this act: *Provided*, That any and all lands *heretofore reserved* to the United States by any act of Congress or *in any other manner* by competent authority for the purpose of aiding in any *object of internal improvement* or *other purpose whatever*, be, and the same are hereby, RESERVED and EXCEPTED from the *operation of this act*, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United

States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

This act differs from that of March 3, 1863, in some respects:

(1) It names the U. P. S. B. (now M., K. and T. Co.) as the beneficiary, and provides for *patents* to be issued *by the Secretary of the Interior* directly to the company.

(2) It gives indemnity sections of lands in both *odd* and *even* numbered sections.

(3) The company is not required or authorized to make the *Emporia branch* of the A., T. and S. F. road, or any branch.

OTHER STATUTES AND FACTS.

Other provisions of statutes and other facts will be stated in discussing the several points arising for argument.

ARGUMENT.*

TITLE OF UNITED STATES ORIGINALLY CLEAR—ONUS ON DEFENDANT BELOW TO SHOW ITS TITLE.

The lands included in the State of Kansas were ceded "to the United States forever and in full sovereignty"

* In this argument I have copied sometimes, without marking as quoted, matter from—

1. My printed "OPINION," given May 1, 1880, as to lands in controversy in this case, to settlers thereon.

2. My printed argument in *Neer* v. *Williams*, 27 Kansas Reports, 1.

3. The very able argument of Hon. C. F. Hutchings in that case.

4. The very able arguments also of Hon. George R. Peek and Hon. C. F. Hutchings in the circuit court in the above case of *Brewster, Att'y-Gen'l, &c.*, v. *K. C., L. and S. R. R. Co.*—W. L.

by the treaty with the French Republic of April 30, 1803. (8 U. S. Statutes, 200.)

The Indian right of occupancy was in due time extinguished, and the lands in the State became the "public lands" of the United States.

The Constitution invests *Congress* with the *exclusive* "power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." (Art 4, sec. 3.)

As the title of the United States to the lands in controversy was "clear and unquestionable" before any act of Congress was passed authorizing their sale, or otherwise giving or granting them or authorizing a conveyance thereof, it necessarily devolves on the defendant claiming them to show the provision of law, if any, under or by virtue of which it has acquired title. The defendant assumes the *onus probandi* as to its title.

THE M., K. AND T. CO. CLAIMS TITLE UNDER THREE RAILROAD LAND-GRANT ACTS.

The defendant does not claim title *as a purchaser*, under any statute authorizing a sale for a consideration.

The defendant *does claim* to have acquired title, under *some* or *all*—and it seems to be *in doubt* as to which—of the railroad land-grant acts of Congress of—

(I) MARCH 3, 1863 (12 STAT., 772; RESPONDENT'S PROOFS, 27);

(II) OF JULY 1, 1864 (13 STAT., 339; RESPONDENT'S PROOFS, 26); and,

(III) THE ACT OF JULY 26, 1866 (14 STAT., 289; RESPONDENT'S PROOFS, 21).

Unless defendant can establish title under one or more of these, the plaintiff is entitled to a decree.

DEFENDANTS [THE M., K. AND T. CO.] CLAIM FAILS, IF THERE CAN BE DOUBT ABOUT IT.

It is now too well settled to be called in question that the defendant has acquired no title under any of said acts, if there can be any question of the *purpose of Congress to give such title.*

This rule was sanctioned by the Supreme Court *on one of the statutes now in question*, in *L. L. and G. R. R. Co.* vs. *U. S.* (92 U. S., 740), in which it is laid down that—

> If rights claimed under the Government be set up against it, they must be so *clearly defined* that *there can be no question* of the purpose of Congress to confer them.

The court affirmed the doctrine laid down in *Dubuque and Pacific Railroad Company* vs. *Litchfield* (23 Howard, 88), in which it is said—

> If we *had doubts from any obscurity* of the act of Congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in *clear and explicit language;* and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied.

And see *Ohio Life Insurance and Trust Co.* vs. *Debolt*, 16 Howard, 435; *Stourbridge* vs. *Wheeley*, 2 Barn. and

Ad., 792; *Parker* vs. *Great Western Railway Co.*, 7 M. and Gr., 253; *Com.* vs. *Erie and N. E. Railroad Co.*, 27 Penn, 339; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 544; *Mills* v. *St. Clair County*, 8 Howard, 581; *Richmond R. R. Co.* v. *Louisa R. R. Co.*, 13 Howard, 81; *Rice* v. *R. R. Co.*, 1 Black, 380; *U. S.* v. *Arredondo*, 6 Peters, 738; *Binghampton Bridge Case*, 3 Wallace, 75; 9 Opinions Att'y Gen'l, 59; *Id.*, 271; 13 Opinions, 363.

THE POWERS OF OFFICERS TO BE STRICTLY CONSTRUED AND STRICTLY PURSUED.

The Secretary of the Interior and other *general* officers have *general powers*, conferred by the revised and other general statutes. Even under *such* statutes the powers of public officers *must be strictly pursued*, and in the absence of specific statutory authority the act of such officer *does not bind the Government.*

Parsel v. *Barnes & Bro.*, 25 Ark., 261, 272; *Green, &c.*, v. *Beeson*, 31 Ind., 7; *State* v. *Bank of State*, 45 Mo., 528; *Andrae* v. *Redfield*, 12 Blatch. C. C., 407; S. C., 98 U. S., 225.

But the power given by the land-grant acts to the Secretary of the Interior and other officers is a *special statutory power*, to be *strictly construed* and "must be *pursued* in *strict compliance* with the [express] terms of the statute." Bishop, Written Laws, 119, and cases cited; Sedgwick on Statutes, 2d ed., 76.

The same reason and rule of public policy which require land-grant acts to be strictly construed, and strictly pursued, require the power of all officers exercising authority under them to be strictly construed and strictly pur-

sued. Following these principles the words of these acts giving powers to officers "should not be extended by implication," and "if these do not support the right claimed it must fail." (*Mills* v. *St. Clair County*, 8 Howard, 581.) "The corporation can claim nothing but what is clearly given." (13 How., 81.)

Kent, in discussing the "execution of powers," says:

> It is the plain and settled rule that the conditions annexed to the exercise of the power *must be strictly complied with*, however *unessential* they might have been if no such precise directions had been given. They *are incapable of admitting* any *equivalent* or *substitution*, for the person who creates the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse. (4 Kent, 330.)

THE SOURCES UNDER WHICH DEFENDANT CLAIMS TITLE.

With these principles in view, the several claims on which defendant, as *grantee* of the M. K. and T. Co., asserts title, are to be considered.

These several alleged sources of title are:

I. The land-grant act of March 3, 1863. (12 Stat., 772.)

II. The Kansas act of February 9, 1864, accepting the grant and designating the A. T. and S. F. Co. as the beneficiary. (Respondent's proofs, 32.)

III. An assignment, made March 19, 1866, by the A. T. and S. F. Co., of its right to build the Emporia branch to the M. K. and T. Co. (Respondent's proofs, 37.)

IV. Resolution of the legislature of Kansas, February

26, 1867, assuming to ratify said assignment. (Respondent's proofs, 42, 43.)

V. The building of a *trunk line* road, from Junction City, by way of Emporia, down the Neosho Valley to the south line of Kansas, by the M. K. & T., as authorized by the act of Congress of July 26, 1866 (14 Stat., 289; respondent's proofs, 21), occupying *in part* the route of the *Emporia Branch* required by the Act of 1863.

VI. The selection by the M. K. & T. Co., without the authority of the Secretary of the Interior (printed record, 35; defendant's proofs, 60; see record 57–58; respondent's proofs, 66) of the land in controversy as indemnity, approved April 10, 1873 by said Secretary *only under the Act of* 1863, not under the Act of 1866. (Respondent's proofs, 66, 67, 69; printed record, 19, 35, 52, 58, 65, 67.)

VII. The land-grant act of Congress of July 1, 1864. (Respondent's proofs, 26).

VIII. The patent above mentioned to the M. K. & T. Co.

IX. Conveyances from the M. K. & T. Co. to the L., L. & G. Co., now called the Kansas City, Lawrence and Southern Kansas Railroad Co., the defendant herein.

These several alleged sources of title will be separately considered.

FIRST PROPOSITION.

THE CLAIM OF TITLE UNDER:

1. THE LAND-GRANT ACT OF MARCH 3, 1863. (12 Stat., 772; *respondent's proofs*, 27.)

2. THE KANSAS ACT OF FEBRUARY 9, 1864, ACCEPTING THE GRANT OF SAID ACT OF CONGRESS. (*Respondent's proofs*, 32.)

3. THE PATENT ISSUED BY THE GOVERNOR OF KANSAS TO THE M. K and T. Co. (*Printed Record, p.* 10; *Respondent's proofs*, 69.)

THE DEFENDANT AS GRANTEE OF THE M. K. AND T. CO. HAS NO TITLE UNDER THESE.

The patent recites the authority on which the governor *decided* that the M. K. and T. Co. was entitled to a conveyance, as follows:

> Whereas The Missouri, Kansas and Texas Railway Company, HAVING CONSTRUCTED A RAILROAD and telegraph LINE FROM JUNCTION CITY TO THE SOUTHERN BOUNDARY OF THE STATE of Kansas, is entitled under the provisions of the act of Congress, approved March 3, 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," and of the act of the legislature of the State of Kansas, approved February 9, 1864, entitled "An act to accept a grant of lands, made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such railroads and telegraphs," to

the following described tracts of land as certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior April 10, 1873, said to contain $27{,}732\frac{50}{100}$ acres, namely (description.)

The patent then in form makes a grant, as it says, of:

> The said tracts, rights, privileges, immunities, and appurtenance of whatsoever nature, accruing under the provisions of the laws relating thereto, *and in accordance with the act of Congress of March* 3, 1863.

No title passed under this patent, and under the laws, and matters recited in it, for the following reason:

I.—The patent is void on its face.

1. The Act of 1863 grants lands to the State of Kansas to aid in the construction of designated lines of roads and branches thereof.

The Kansas act of 1864 accepts the grant for the purpose stated, and designates the L., L. and G. Co. to make one line, and the A. T. and S. F. Co. to make the other. The M. K. and T. Co. is not named in either act. It has been forcibly and truly said:

"Under the two acts, recited in the patent, the Missouri, Kansas and Texas Company get no more rights than the New York and Erie or the Illinois Central. It is an absolute stranger to both acts. The patent, therefore, so far as its recitals are concerned, was issued without authority. If the patent had contained *no* recitals, it could not be upheld as a legal conveyance, for the governor of a State has no general power to convey. But the general want of authority to convey is not removed by erroneously reciting an act which is supposed to confer that authority.

Suppose the patent had referred to Magna Charta or the Declaration of Independence as authority for its issuance, would the recital have conferred any rights? Clearly not; but those two venerable instruments are not more silent in regard to the Missouri, Kansas and Texas Company than are the two acts recited in the patent."

2. The patent gives as the *authority for*, and as a *reason* why, the M., K. and T. Co. "is *entitled* under *the provisions of said acts*" to the lands mentioned, that said company has—

> Constructed a [trunk line] railroad and telegraph line *from Junction City* [near Fort Riley] *to the southern boundary of the State of Kansas.*

But the "said acts"—the act of Congress of 1863 and the Kansas act of 1864—*do not give any authority to the M., K. and T. Co.* to make *that line* of road. That line is a *trunk line*, with no element of a BRANCH to the A., T. and S. F. road, and having *no connection with*, and in *no manner* controlled or operated by, any R. R. Co. named in the act of Congress of 1863 or in the Kansas act of 1864.

> A deed executed under *a power* does not pass title to land unless the sale was in accordance *with the terms* of the power. (*Morrell* v. *Cone*, 22 Howard, 75.)

3. The patent recites that the M., K. and T. Co. is entitled under the act of Congress of March 3, 1863, and the Kansas act of February 9, 1864—

> To the following described tracts of land as certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior, April 10, 1873. (Printed Record, 35; Defendant's Proofs, 60. See Printed Record 57, 58.)

A fatal objection to this, as to the patent, is that it is *void on its face.* It is made *solely* under the act of 1863, and the M., K. T. and Co. is not a beneficiary under *that act.*

For reasons hereafter stated the court cannot say, *in this action,* that the approval should have been under the act of 1866. (See under caption SECOND, point 3, *post,* page 31.

Thus far the title of defendant as grantee of the M., K. and T. Co. has been considered under the statutes and proceedings *recited* in the patent.

Before considering how far the *other statutes and proceedings* under which title is claimed by defendant *might have been made available* to support such claim of title, it is proper to ascertain whether any of them can be examined by the court.

This leads to the consideration of a

SECOND PROPOSITION.

THE COURT CANNOT SUPPORT THE PATENT, OR ANY CLAIM OF TITLE, BY IGNORING THE STATUTES AND PROCEEDINGS RECITED IN THE PATENT AS THE AUTHORITY FOR ISSUING IT, AND BY REFERENCE TO OTHER STATUTES OR PROCEEDINGS, DEHORS, EVEN IF BY POSSIBILITY THE SECRETARY OF THE INTERIOR AND GOVERNOR OF KANSAS MIGHT HAVE CONSIDERED THEM AND MADE THEM AVAILABLE TO GIVE TITLE, WHEN, IN FACT, IF THEY CONSIDERED THEM, THEY REJECTED THEM, AND REFUSED TO GIVE TITLE UNDER THEM.

As preliminary to this it is to be borne in mind that the *patent* and *every act* of every officer of the United States,

and of the Governor of Kansas, *refers to the act of Congress* of 1863, the Kansas act of February 9, 1864, accepting it, and proceedings *thereunder*. THESE constitute the *sole authority* on which they acted and under which the patent was issued.

The M., K. and T. Co. can claim no title, *except such as is authorized by the statutes and proceedings recited in the patent*, for the following reasons:

I.—The M., K. and T. Co., by accepting the patent, is estopped from claiming title except as authorized by the recitals therein.

Thus it is said:

> In regard to *recitals in deeds* the general rule is, that all parties to a deed are bound by the recitals therein, which operate as an *estopped*. * * * It is not offered as secondary, but as *primary evidence*, which *cannot be averred against* and which forms a muniment of title. (1 Greenl. Ev., sec. 23, 189; *Carver* v. *Jackson*, 4 Peters, 83.)

In *Crane* v. *Lessee of Morris*, 6 Peters, 612, the Supreme Court said:

> The *recital* as an estoppel binds all *privies* whether claiming by the *same* or by a distinct instrument. See Wade, Law of Notice, secs. 308, 311; *Carver* vs. *Jackson*, 4 Pet., 83; *Bonner* vs. *Ware*, 10 Ohio, 468; *Reeder* vs. *Barr*, 4 Ohio, 446; *Bell* vs. *Duncan*, 11 Ohio, 192.

And of a *recital* as affecting a privy in estate it is said:

> It is such conclusive evidence that it cannot be averred against [by the party claiming under it.] * * * It does not, however, bind strangers who claim by title paramount to the deed or persons

claiming by an adverse title. * * * The recitals of a deed estop only parties and privies. Herman, Estoppel, ch. ix., sec. 229, 237.

When both parties claim under the same grantor, the recitals in the deeds constituting the claim of title under which each holds will, so far as they enter into and qualify the grant, be evidence for or against the other. Herman, Estop., sec. 237; *Van Rensselaer* vs. *Kearney*, 11 How., 323.

Wade, in his Law of Notice, sec. 308, 310, shows that a purchaser may in fact be ignorant of the recitals in his chain of title, but in law such notice "*is actual*, though it clearly rests upon a presumption of law." *White* vs. *Foster*, 102 Mass., 375; *George* vs. *Kent*, 7 Allen, Mass., 16.

The defendant is bound to look to the *whole* chain of its title, and it is chargeable with knowledge, as Wade says, "if recitals would lead to knowledge." Secs. 313, 324. *Harris* vs. *Fly*, 7 Paige, 421; *McAteer* vs. *McMullen*, 2 Pa. St., 32; *Lodge* vs. *Simonton*, 2 Pa. St., 439; *Hill* vs. *Simpson*, 7 Ves. Jr., p. 152. Anything which puts it *on inquiry* is sufficient. *Sigourney* vs. *Munn*, 7 Conn., 324.

Where, upon the face of the title-papers, the purchaser has full *means of acquiring* complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof. *Oliver et al.* vs. *Piatt*, 3 How., 333, 410.

Landes vs. *Brant*, 10 How., 348; *Lea* vs. *Polk Co. Cop. Co.*, 21 How., 495; Wade, Law of Notice, § 273, and note citing numerous cases.

"A deed executed under a *power* does not pass title to land unless the sale was in accordance with the power." (22 How., 75.)

II.—But rights here are not limited alone by estoppel; they were intended to be, and are, limited as stated in the patent. This will appear for several reasons.

1. The officers of the Government and the governor of Kansas and other officers, by referring to the Act of 1863, &c., *as the* SOLE *authority* for all they did, by implication rejected and refused to exercise any power which they might have exercised under any other source. This must be so by force of the maxim *expressio unius exclusio alterius*. By affirming the exercise of power under the Act of 1863, &c., they denied its exercise under any other authority.

And this is especially so when, as in *this case*, the M., K. and T. Co. *made a claim* under the Act of 1866 which was repudiated by every act of every officer concerned. Thus the claim of the M., K. and T. to indemnity under the act of 1866 was repudiated. (Printed record, 35, 58.)

This principle is well supported by authority. Thus in *Bradish* v. *Gibbs*, 3 Johns. Ch., 550, Chancellor Kent, citing *Marlborough* v. *Godolphin*, 2 Vesey, 78, says:

> The principle is well established that where a person takes *by execution of a power* he *takes under the authority of that power*. The meaning is, as Lord Hardwicke expresses it, that the person takes in the same manner as if the *power* and *instrument executing the power* had been incorporated in one instrument, and as if all that was in the instrument executing had been expressed in that giving the power. * * * The party who claims, under the execution of a power, makes title under the power itself.

2. An agent may have *two powers of attorney* couched in different terms; the duties and liabilities of the principal may be different under each. The rights of persons dealing with the agent may be different when authority is exercised by virtue of one power of attorney from what they would be if exercised under another. Where the agent has a *discretion* to exercise authority under one or the other, or both, and chooses to *act under one only*, the party dealing with him, *in express terms under that one*, can only acquire such rights as IT permits to be given.

Thus in *Shirras and others* v. *Caig & Mitchell*, 7 Cranch., 34–52, the facts condensed are: In December, 1801, Edwin Gairdner was legally and equitably seized of one undivided half of a tract of land. James Gairdner, owning the equitable title to one-third of the land, gave a power of attorney to Edwin Gairdner to convey, &c. Edwin Gairdner executed a mortgage purporting to convey the *whole tract*, but not reciting on its face the power of attorney from James; the mortgagee *claimed* a right to foreclose the mortgage on the *whole land*.

Marshall, C. J., said:

> For this claim the court is of opinion there can be no just pretension, because he [Edwin Gairdner] *did not affect to pass the* interest of James Gairdner, * * * consequently *the power of attorney may be put out of the case*, and the conveyance [mortgage] could only operate on *his* [Edward's] *own* legal or equitable interest.

This establishes the principle that a conveyance *clearly professing to act under one authority*—the title held by the grantor—cannot *operate to pass any other title*, although

the grantor held a *separate authority* to do so, but did not choose in *express terms* to exercise it.

Thus it is said:

> Where a man having *several* powers, *refers to some*, and executes them formally, that is an argument *against any other power* being executed by general comprehensive words in the same instrument. 1 Sugden on Powers, 408 [359]; *Att'y-Gen'l* v. *Vigor*, 8 Ves., jr., 256; Farwell on Powers, 156–165.

It logically follows that when public officers have a *discretion* to act under different sources of authority to convey land, but act only *under one*, and refuse to act under the other, no title passes except such as can be conveyed under the authority invoked. This case is a forcible illustration of the principles stated, and of the necessity of their enforcement.

The L., L. and G. Co., and the A., T. and S. F. Co., were organized *prior* to the act of 1863.

This act made a *grant* for, and gave indemnity rights to, the A., T. and S. F. Co. for a *branch* from Emporia to Colony. The grant was *in præsenti* taking effect March 3, 1863. The A., T. and S. F. Co. failed to make the *branch*, and so lost its rights both for granted and indemnity lands therefor. The M., K. and T. was not organized until September 20, 1865.

Now the Government officers solemnly decided, as the patent says, that because the M., K. and T. Co.—

> Having constructed a railroad * * * line from Junction City to the southern boundary of the State * * * is entitled,

Under the act of 1863, the Kansas act of 1864, and the proceedings had *under these*, to the lands certified and approved under the act of 1863, as indemnity, simply because said *trunk* line of road followed a *part* of the course of the branch down the Neosho Valley!

The effect of this was to give *indemnity rights*, under the act of 1863, *antedating* the existence of the M., K. and T. Co. And it is not difficult to perceive that it *must have secured* for the M., K. and T. Co. lands within *granted* or *ten-mile limits* which would have been *lost to it* by the homestead and pre-emption claims of settlers intervening between 1863 and 1866 if the company could only claim under the act of 1866.*

This court does not have before it the *withdrawals from market* of lands under the act of 1863, nor any evidence how *these* and many other material facts might affect the claim of the M., K. and T. Co. to indemnity lands *under the act of* 1866, under the A., T. and S. F. assignment, &c. This court cannot know but that, as the fact is, all *indemnity* rights, as in fact *granted* rights also, of the M., K. and T. Co. under the act of 1866, *were satisfied.*

These were questions proper for the consideration and decision of those officers. If they erred this court cannot in this case perform the executive duty or exercise the executive power of administering the land-grant acts.

3. The Land Department having *decided* that the FACTS did not exist to justify the issue of a patent under the Act

*At the last session of Congress the Secretary of the Interior transmitted to the Senate, in compliance with a resolution asking therefor, a list of homestead and pre-emption entries of settlers, many of them *illegally* canceled in favor of railroad companies, but it was *never printed.*

of July 26, 1866, and the M., K. and T. Co., having ratified this finding by accepting a patent under the act of 1863, is concluded by the finding. This is shown by the authorities on *estoppel* above cited. Counsel for defendant have cited numerous authorities to prove this.

Smelting Co. v. *Kemp*, 104 U. S., 450, 640; *Van Wycke* v. *Knevals*, 106 U. S., 368; *Johnson* v. *Tousley*, 13 *Wall.*, 72–83; *Quinby* v. *Coulsen*, 104 U. S., 420; *Steel* v. *Smelting Co.*, 106 U. S., 447; *Vance* v. *Burbank*, 101 U. S., 514; *Boardman* v. *Lessee, &c.*, 6 Pet., 328; *Moore* v. *Robbins*, 96 U. S., 535; *Shepley* v. *Gowan*, 91 U. S., 340; *U. S.* v. *Arredendo*, 6 Pet., 691; *U. S.* v. *Schwartz*, 102 U. S., 401.

III.—The court has no power in such action as this to pass on the claim of the M., K. and T. Co. to lands under any of the statutes or proceedings which the EXECUTIVE officers of the United States or of Kansas, have rejected or not considered.

Congress alone has power to *dispose of*, or *authorize executive officers* to dispose of, the public lands.

THE COURT CANNOT PERFORM EXECUTIVE DUTIES.

The administration of the railroad land-grant acts now in question has been intrusted by Congress to the Secretary of the Interior, the Commissioner of the General Land Office, the local land officers, and the Governor of Kansas. They are all *executive* officers; they exercise *executive* power.

A court may by *mandamus* compel them to act when they unlawfully refuse to act under a statute. How far

their judgment, if erroneous, in rejecting a claim to land may be controlled by mandamus it is unnecessary to inquire. No such case is presented.

This is not a chancery proceeding either to enjoin illegal action, nor is it an equity case seeking a *mandatory injunction*, or a decree to compel action in a particular direction. (*Cunningham* v. *Macon and Brunswick R. R. Co.*, 109 U. S., 446; *U. S.* v. *McLemore*, 4 Howard, 286.)

The bill in this case seeks to quiet the title of the United States to the lands in controversy. The authority of this court to decide whether the defendant has acquired title in the forms indicated by the patent is not disputed.

This court can exercise only *judicial power*, and the administration of the railroad land-grant acts is not *judicial* in its character.

It was said by Brewer, J., in his opinion in the circuit court in this case:

> When the legal title fails, the defendant may defeat the action by proof that the *equitable* title to the *very lands* is with it, but *not by proof that it had an* UNADJUSTED *equitable* CLAIM UPON THE GOVERNMENT FOR AN EQUAL QUANTITY *of* UNSELECTED lands.
>
> The act of 1866, as heretofore stated, made a direct grant to the railroad company. It provided for *patents from the Government to it.* It granted lands in place and provided for indemnity lands to be *selected* by the Secretary of the Interior. The lands in controversy are not part of the lands in place, but are within the indemnity strip. Were they ever *selected* as indemnity lands *under the act of* 1866? Respondent claims that they were, but the evidence does not satisfy me of the fact, but rather indicates the contrary.

> It is true that in August, 1872, the Leavenworth, Lawrence and Galveston and the Missouri, Kansas and Texas companies filed a joint claim for these lands, as indemnity lands, in which the former company claimed under the act of 1863, and the latter under both the acts of '63 and '66. But the Commissioner of the General Land Office *recognized the claim as under the act of* 1863 ALONE, and certified the lands to the State. This was done in April, 1873. But for the reasons given heretofore I think the Missouri, Kansas and Texas Company had no valid, legal, or equitable claim under the act of '63. But it is said that under the act of '66 it did have a valid claim, and that the mistake of the Commissioner in naming the statute does not destroy equitable rights. But how can it be inferred that the Secretary of the Interior would have recognized any claim under the act of '66, or, recognizing it, made a selection of these lands in satisfaction thereof. It does not seem to me that, under the testimony, it can be said that the Commissioner would or ought to have selected these lands. Indeed, I cannot see how the company was entitled to so large a body of lands as was in fact patented and certified to it.

It is not shown by the record in this case that the court has now before them *all the evidence* necessary to pass on the claims of the M., K. and T. Co. to the lands now in question.

The court cannot know but that homestead and preemption rights have attached to these lands in a form to prevent their *selection* by the Secretary of the Interior as indemnity lands under the act of 1866. The court cannot estimate by any evidence before it *how much* indemnity lands the M., K. and T. Co. may be entitled to claim,

if any. And if this were not so the Secretary of the Interior *has not* selected *these* lands under the act of 1866. (Printed Record, 19, 35; Respondent's Proofs, 66, 67, 69.) If he were to do so the court cannot know he would *select these lands* under that act, nor can the court exercise the *discretion* and *judgment* to make a selection which the act of 1866 intrusts to *him* alone. (Respondent's Proofs, 21; 14 Stat., 289.)

And if all were here in the record the court cannot in this case—outside of its power by *mandamus* or *mandatory injunction*—do what executive officers have refused to do; the court cannot do what executive officers even ought to have done but have refused to do, especially when, as in this case, the executive officers have not given sanction to *any step* or *proceedings* under any statute other than those recited in the patent.

THE COURT CAN CANCEL LAND PATENS ILLEGALLY ISSUED.

The power of the courts to declare *illegal and void* the proceedings and patents issued by executive officers administering the laws authorizing a sale or other disposition of the public lands is undoubted.

Thus, where officers, in executing laws relating to the disposal of the public lands of the United States, or of lands held in trust for sale, have, without authority of law, issued evidence purporting to convey the title to such lands, or where a grant of such lands is claimed by force of a law, the United States may, in such cases, in their own name, by direction of the Attorney-General, maintain a bill in

equity to cancel such evidence of title, and to enjoin claimants from asserting title.

O'Brien vs. *Perry*, 1 Black, 139; *Lindsay* vs. *Hawes*, 2 Black, 554; *Bagnell* vs. *Broderick*, 13 Peters, 436; *State of Minnesota* vs. *Bachelder*, 1 Wallace, 115; *United States* vs. *Stone*, 2 Wallace, 525–536; *Hughes* vs. *United States*, 4 Wallace, 235; *Johnson* vs. *Towsley*, 13 Wallace, 72–91; Opinions Attorney-General Legare, Nov. 26, 1842, 1 Lester, 659; *Seward* vs. *Hicks*, 1 Har. & McHenry, 24; *Lord Proprietor* vs. *Jennings*, *idem*, 92; *The King* vs. *Vernon*, 3 Levine, 281.

In the case in 2 Wallace, 525, Mr. Justice Grier says:

> Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party should have received the patent; in such cases the law will pronounce them void.

The court, then, has power in this suit to decree a cancellation of the certified lists of lands furnished by the Secretary of the Interior to the Governor of Kansas, and the patents by him issued to the railroad company.

But *if* a court may by mandamus compel an officer to act under any statute when he refuses to act, or denies a right under it so clearly authorized as to leave no room for the exercise of judgment or discretion, yet this court in this case *cannot consider* any right claimed by the defendant under any statute other than those recited in the patent. The authorities show that a *court cannot* interfere with executive officers or control the exercise of their judgment and discretion in the issue of patents for land. Courts can only act AFTER such officers *have* fully

executed their authority; then, and not until then, courts may determine which of two claimants to land for which a patent has issued *under a specified statute* has the real legal or equitable title to the land *under* SUCH statute, or under *some* statute, rights under which have been fully and finally passed on by the Land Department.

Thus, in *Johnson* v. *Towsley* (13 Wall., 72, 85), it was shown that Towsley, on the 15th of June, 1858, made a pre-emption claim to certain land. On the 5th of October, 1860, Johnson also made a pre-emption claim.

The Secretary of the Interior decided that Johnson was entitled to the land, and a patent was accordingly issued to him.

Towsley filed a bill in chancery, and the court decreed that the *patent to Johnson be canceled*, and that the title be vested in Towsley.

The Supreme Court of the United States held, in effect, that Towsley had a perfect, equitable title, and that a court of equity would review the action of the officers charged with the duty, *under the pre-emption law*, of issuing a patent.

The court, referring to the decision of the land officers in favor of a party applying to enter land as a pre-emptor or otherwise, their acceptance of his money and certification of his right to a patent, said:

> Undoubtedly this constitutes a *vested right*, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been *done in violation of law*, and, if it is has, to give appropriate remedy.

And the syllabus of this case (section 8) says:

> The decisions of this court on this subject establish:
>
> I. That the judiciary will not interfere by mandamus, injunction, or otherwise with the officers of the Land Department in the exercise of their duties WHILE THE MATTER REMAINS IN THEIR HANDS FOR DECISION.
>
> II. That their decision on the facts which must be the foundation of their action, unaffected by fraud or MISTAKE, is conclusive in the courts.
>
> III. But that *after the title has passed from the Government to individuals*, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

Numerous authorities are cited in this case: *Garland* v. *Wynn*, 20 How., 8; *Lytle* v. *Arkansas*, 22 *id.*, 192; *Lindsey* v. *Hawes*, 2 Black, 559; *Green* v. *Liter*, 8 Cranch, 229; *Finly* v. *Williams*, 9 *id.*, 164; *McArthur* v. *Browder*, 4 Wheat., 488; *Hunt* v. *Wickliffe*, 2 Pet., 201; *Minnesota* v. *Bachelder*, 1 Wall., 109; *Silver* v. *Ladd*, 7 *id.*, 219; *Smelting Co.* v. *Kemp*, 104 U. S., 636; *Steel* v. *Smelting Co.*, 106 U. S., 447; *More et al.* v. *Wilkinson*, 13 Cal., 478; *Beard* v. *Fudry*, 3 Wall., 478; *Gibson* v. *Choteau*, 13 *id.*, 92; *Hoofnagle* v. *Anderson*, 7 Wheat., 212; *Polk's Lessee* v. *Wendell*, 5 *id.*, 304; *Jackson* v. *Johnson*, 1 Bibb, 56; *Schedda* v. *Sawyer*, 4 McLean, 186; *Holt* v. *Hemphill*, 3 Ohio, 332; *Wabash, St. L. and P. R. R.* v. *Ham*, 114 U. S., 559; *East Alabama R. R.* v. *Doe*, 114 U. S., 340.

The same principle is settled in *Walker* v. *Smith*, 21

How., 581; *French* v. *Fyan et al.*, 93 U. S., 173; *Marquez* v. *Frisbie*, 101 U. S., 475; *Litchfield* v. *Register*, 9 Wall., 552; and *Secretary* v. *McGarrahan*, *id.*, 298.

NO TITLE PASSES BY LAND PATENT ROAD ON ITS FACE.

Now, assuming that the patent in question *is void on its face*, NO TITLE passed from the United States under it.

A patent issued for lands not authorized to be sold, or which are reserved from sale, or issued without authority of law, is not only voidable, but void. (*Holden* vs. *Joy*, 17 Wall., 211; 1 Opin. Att'ys-Gen'l, 420; 2 Opin., 186; 5 Opin., 9; *Stoddard* vs. *Chamber*, 2 How., 284; *Kissell* vs. *St. Louis School*, 18 How., 18; *Easton* vs. *Salisbury*, 21 How., 431; *Brown* vs. *Clements*, 3 How., 650; *U. S.* vs. *Stone*, 2 Wall., 525; *Wilcox* vs. *Jackson*, 13 Pet., 491; *Richart* vs. *Phelps*, 6 Wall., 160; *State of Indiana* vs. *Miller*, 3 McLean, 151; *Hunter* vs. *Hemphill*, 6 Miss., 106; *Jackson* vs. *Lawson*, 10 Johns., 26; *Railroad Co.* vs. *Smith*, 9 Wall., 96; *Doe* vs. *Files*, 3 Ala., 47; *Hittuk-ho-mi* vs. *Walls*, 7 S. & M., 363; *Perry* vs. *O'Hanlan*, 11 Miss., 585; *People* vs. *Livingston*, 8 Barb. (Sup. Ct.), 253; *Wright* vs. *Rutgers*, 14 Miss., 585; *Mayor* vs. *De Armas*, 9 Pet., 224; *Marsh* vs. *Brooks*, 8 How., 223; *Gastan* vs. *Canada*, 39 Mo., 357; *Lindsey* vs. *Homes*, 2 Black, 554; *State* vs. *Bachelder*, 1 Wall., 109; 5 Minn., 223; *O'Brien* vs. *Perry*, 1 Black, 132; *Clemens* vs. *Warner*, 24 How., 394; *Garland* vs. *Wynn*, 20 How., 6; *Barnard* vs. *Ashley*, 18 How., 43; *Grinch* vs. *Foltz*, 19 Pa. St., 38; Report of Commissioner General Land Office for 1868, p. 126; *Hale* vs. *Gaines*, 22 How., 144; 5 Wheat., 301.)

In Polk *vs.* Wendell, 9 Cranch, 99, Chief-Justice Marshall said:

> A patent is void at law * * * if the officer who issued the patent had no authority so to do.

See S. C., 5 Wheat., 303; *Ladega* vs. *Roland*, 2 Howard, 590; *U. S.* vs. *Stone*, 2 Wall., 525.

Assuming that no "title has passed from the Government" under the patent in this case, the court cannot know but that the question of title in favor of the M., K. and T. Co. under *any other* statutes not recited in the patent *yet remains in the hands* of the executive officers *for their decision*, and upon the authority of *Johnson* vs. *Towsley*, 13 Wallace, 85, this court will not consider either any *legal* or *equitable* title claimed by defendant under these statutes. The court will simply declare the patent issued under the act of 1863 *void*.

And if the record shows that the Land Department has rejected the claim of the M., K. and T. Co. under other statutes, it must be assumed that it was done upon a *finding* of *facts* adverse to such claim, and *such finding* cannot be reviewed by the court, *in this case*.

If the Land Department erred simply on a *question of law*, the M., K. and T. Co. cannot ask a judicial review of *that* question without showing that it has a *vested* equitable title to these lands, and that it has not done.

The conclusion follows that the court *cannot make any inquiry* concerning the *legal* or *equitable title* which the M., K. and T. Co. might have claimed, or may claim, under the act of 1866, or of any act not recited in the patent.

OBJECTIONS TO THIS VIEW CONSIDERED.

IV. It was urged in the circuit court, on behalf of the defendant that—

> It would be (1) unconscionable and (2) contrary to both law and equity, under the circumstances of this case, *to set aside our title on the ground that it was passed under the act of* 1863, IF *the grantee was entitled to it under that of* 1866. (Brief of McCrary & Hagerman, 34.)

There is cited in support of this: *Commissioners* v. *January*, 94 U. S., 202; *U. S.* v. *Smith*, 94 U. S., 217; *U. S.* v. *Bostwick*, 94 U. S., 66; *U. S.* v. *State Bank*, 96 U. S., 36; *The Siren*, 7 Wall., 159.

This assumes (I) that the *court* can administer the land-grant acts according to *conscience*, and (II) that the court can *reject* the *power recited in the patent* and *refer its execution* to *some other* power. These positions are both untenable. The *last* will be *first* considered.

(I) The court cannot ignore the power recited in the patent and refer its execution to any other power.

The cases cited above do not support the position assumed. In the first case cited county bonds were issued, reciting as authority for their issue a statute which was *repealed*, when a statute in force did authorize the issue, and the bonds were sustained under the latter.

This is upon a *principle* well known. The bonds recited a repealed statute. This gave *no power*. This was precisely in legal effect as if the bonds *made no reference* to the power authorizing their issue.

EFFECT OF EXECUTION OF A POWER, WITHOUT REFERENCE THERETO.

When an *officer* or *agent* does an act *as such*, but is *silent* as to his power, and when there is ONE source of power ONLY, the *law* refers the act *to the power*, if the act would otherwise fail AND the intention to execute *the* power *be clear*. Thus Cruise, in discussing the "*execution of powers*," says:

> An instrument may operate as a revocation or appointment, *without any recital or mention of the power*, for if the act done be of such a nature that *it can have no operation* unless *by virtue of* THE *power*, the *law* will resort to THE power, and thereby give validity to the instrument upon the principle that *quando non valet ago, ut ago, valet quantum valere potest.* (Greenleaf's Cruise Real Prop., vol. 2, book 4, title xxii, ch. xvii, sec. 29, citing Hob., 160; *Andrews* v. *Emmot* 2 Bro., Ch. Cas., 303, note (b) by Perkins; 4 Kent. Com., 334; 1 Sugd. Powers, 373 (6 ed.).)

So in *Bradish* v. *Gibbs*, 3 Johns. Ch., 551, Chancellor Kent says:

> The rule as declared in Sir Edward Clere's case (6 Co., 17 b.), and in many subsequent cases (2 Bro. Ch. Rep., 300, 301, 303, and *Bennett* v. *Aburrow*, 8 Vesey, 609), is that if a will be made *without any reference to the power*, it operates as an appointment under the power, *provided it cannot have operation without the power*. If the act can be good *in no other way* than by virtue of the power, and some part of the will would otherwise be inoperative, AND NO OTHER INTENTION *than that of executing the power* can properly be imputed to the testator, the act or will shall be deemed an execution of the power though there be *no reference to the power*.

These *principles* fully sustain the validity of the bonds in the case cited. But they do not apply to give validity to the *patent* in this case.

The patent is *not silent* as to *the power* under which it was made.

THE MAXIM *falsa demonstratio, &c.*

The argument referred to, for defendant, citing the bond case (94 U. S., 202), quotes from it as follows:

> It is true they [the bonds] refer to the wrong statute, but *falsa demonstratio non nocet.*

The doctrine of this maxim is not applicable now. Here there is *no falsa demonstratio.* The patent recites the very statutes *intended* to be recited.

The whole maxim is *falsa demonstratio non nocet, cum de corpore constat.*

And Greenleaf, explaining it, says:

> Here so much of the description as is false is rejected, and the instrument will take effect *if a sufficient description remains to ascertain its application.* (1 Greenl. Ev., 301.)

The *italics* are Greenleaf's.

If the rule can be *extended* to apply to cases where an instrument gives *a false description* of the power by virtue of which it is executed, and in such case refers the execution to *one* sole power, it cannot aid the defendant here.

This is done only to *carry into effect the clearly ascertained intention of the officer or agent executing the power,* but *not to defeat it.*

Thus Kent, in discussing the "execution of powers," says:

> If the will [and the *patent* in this case is governed by the same principle] be made *without any reference to the power*, it operates as an appointment *under* the *power* provided it cannot have operation without the power.
>
> The *intent must be so clear* that *no other reasonable intent* can be imputed to the will; and if the will does not refer to a power, or the subject of it, and if the words of the will may be satisfied *without supposing an intention* to *execute the power*, then unless the *intention* to execute THE *power* be clearly expressed, it is no execution of it." (4 Kent's Com., 335.) See Farwell on Powers, 156–165.

The patent in this case is *not silent* as to the power, hence the defendant is not aided by the principle stated.

If the patent was *silent as to the power*, the defendant claims under *different conflicting powers*, and the court could not say *which one* the executive officers in issuing the patent, &c., *intended to execute*.

And here the intention to execute a power under the act of 1863 *is clear and certain*, and it is equally clear and certain that there was *no intention* to execute any *other power*.

The conclusion is irresistible that the court cannot ignore the recitals in the patent and refer its execution to some other power.

(II) The question of conscience and equity.

The defendant cannot be aided by considerations of conscience and justice because (1) the court has no power

in this case to do so, and (2) because the claim made by the defendant is destitute of conscience or justice.

This subject will be more fully discussed in considering the equities of the M., K. and T. Co. under the act of 1866, &c., but some of the reasons in brief will now be stated on this branch of the case.

COURT CANNOT EXECUTE LAND-GRANT ACTS.

1. It is respectfully submitted that it is shown above that the court cannot administer the land-grant acts of Congress; that to do so would be a judicial invasion of executive power, or, to be more *specific*, the court cannot do what executive officers have refused to do; the court cannot do what executive officers even ought to have done, but have refused to do, when, as in this case, the executive officers have not given sanction to *any step* or *proceeding* under any statute other than those *recited* in the *patent*, and when, notwithstanding the issue of a void patent, the legal title yet remains in the United States.

Of course it is not conceded that the Land Department should or could give the M., K. and T. Co. any lands under the act of 1866. On the contrary, it will be shown that this could not have been done.

RAILROAD COMPANY HAS NO EQUITY.

2. The evidence in this case establishes no equity under the act of 1866 in favor of defendant to any specified tract of indemnity land.

(1) No equitable right attaches until *actual selection* by the Secretary of the Interior. What is an *equity* or *equitable right* to a specified tract of land as indemnity?

The brief for defendant in the circuit court, pp. 54, 55, undertakes to define such equity by saying of the right to indemnity under the act of 1866:

> If the beneficiary has performed the conditions imposed upon it—if it has earned the *grant*—it has a good equitable title, notwithstanding the failure of the Land Department of the Government from any cause, to execute the *grant* &c. * * * The rule that when the beneficiary has earned *particular lands* its equity is complete, notwithstanding the failure of the land officers to *do their duty* applies as well to *indemnity lands* as to lands in *place*.

This is a grave error. When the line of a road is definitely located the *legal title* passes *eo instanti* by a *grant in praesenti*, then an inchoate *equity* attaches in the beneficiary, which becomes perfect by the construction of the road. The statute gives all the *odd* sections within granted limits; they are *identified* by the grant and the location of road.

Thus identification of *granted* lands is essential to give even an inchoate equity, but no legal or equitable title to *indemnity* lands attaches, as in the case of granted lands, by the location and construction of a road.

No title to *indemnity* lands could vest in the R. R. Co. until they were *lawfully* at the proper time selected by the Secretary of the Interior.

The act of 1866 says:

> It shall be the duty of the *Secretary of the Interior to cause to be selected* for the purposes aforesaid [indemnity or lieu lands] from the public lands of the United States nearest to the sections above specified [granted lands] so much land as shall be equal

> to the amount of such lands as the United States have sold, *reserved*, or *otherwise appropriated*, or to which the *right of homestead settlement* or pre-emption has attached as aforesaid, which lands *thus indicated* shall be reserved, &c.

This question may be considered settled by the Supreme Court.

Substantially the same words are found in the act of March 3, 1863 (12 Stat., 772). In *Kansas Pacific R. R. Co.* vs. *Atchison, Topeka and Santa Fé R. R. Co.*, 112 U. S., 421, Miller, J., in considering their effect, said:

> The grant to Kansas, as stated, *conferred only a right* to select land *beyond ten miles* from the defendant's road upon certain contingencies. *It gave no title to indemnity lands in advance of their selection.*

On a similar question in *St. Paul R. R. Co.* vs. *Winona R. R. Co.*, 112 U. S., 731, Miller, J., approving the language of *Ryan* vs. *R. R. Co.*, 99 U. S., 382, said:

> With respect to the lieu lands [indemnity selections], as they are *called*, the right was only a *float*, and *attached to no specified tracts* until the *selection* was *actually made* in the manner prescribed. The same idea is suggested, though not positively affirmed, in the case of *Grinnell* vs. *R. R. Co.*, 103 U. S., 739. In the case of the *Cedar Rapids R. R. Co.* vs. *Herring*, 110 U. S., 27, this principle became the foundation after much consideration of the judgment of the court.

And the learned justice proceeds in an emphatic manner to show that *until a selection is made of the lieu lands*, by the Secretary of the Interior, they are *subject to the homestead entry and to pre-emption*. He says:

> The reason of this is that, as no vested right can attach to lands in place—the odd-numbered sections

within [ten] miles on each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections or parts of parts of sections within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss. Was there a vested right in this company during all this time, to have not only these lands but all the other odd sections within the twenty-mile limits, on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?

See *Kansas Pacific R. R. Co.* vs. *A., T. and S. F. R. R. Co.*, 112 U. S., 414, 421; *Kansas Pacific R. R. Co.* vs. *Dunmeyer*, 113 U. S., 637.

No selection has ever been made under the act of 1866, and hence no equity has yet attached.

2. Other reasons in opposition to the alleged equitable claim of the M., K. and T. Co. to the lands now in controversy will be presented hereafter, and particular attention is respectfully invited to them.

3. If, as above maintained, the court cannot look beyond the statutes and proceedings recited in the *patent*, then it becomes unnecessasy to consider the *several other sources of title* and proceedings under them by virtue of which defendants assert a claim.

But it is, of course, deemed prudent to notice all of these, and to show, successfully—as it is respectfully submitted—that no one of these alleged sources of title gives the defendant any right to the lands in controversy.

This leads to the—

THIRD PROPOSITION.

THE ASSIGNMENT (RESPONDENT'S PROOFS, P. 37) MADE MARCH 19, 1866, TO THE M., K. AND T. R. R. CO. BY THE A., T. AND S. F. R. R. CO. OF ITS RIGHT TO BUILD THE EMPORIA BRANCH WITH ITS FRANCHISES AND LAND RIGHTS CONNECTED THEREWITH, AND THE CONSTRUCTION OF THE M., K. AND T. ROAD AS MADE GIVE NO RIGHT TO ANY INDEMNITY LANDS—NO AUTHORITY TO MAKE A SELECTION THEREOF. THE RESOLUTION OF THE LEGISLATURE OF KANSAS OF FEBRUARY 26, 1867 (RESPONDENT'S PROOFS, 42), RATIFYING SAID ASSIGNMENT IS VOID.

It becomes important now to notice statutes and proceedings in *chronological* order:

STATUTES AND PROCEEDINGS UNDER THEM.

The act of Congress of March 3, 1863, as accepted by the Kansas legislature, authorized the A., T. and S. F. Co. to construct a railroad from Atchison, *via* Topeka, to the western line of the State, with a branch from Emporia to Colony.

The Kansas act of February 9, 1864, in accepting this act, *invited Congress to consent to extend the Emporia branch*

northward to intersect the Union Pacific Railroad, Eastern Division, at or near Fort Riley, by a proviso, as follows:

> *And provided further,* That if the Congress of the United States shall *on or before the 4th day of March,* 1866, CONSENT that the Neosho Valley Branch of the above-named road may be extended so as to intersect the Union Pacific Railroad, Eastern Division, at or near Fort Riley, and shall make a grant of land for such extension of like amount with that granted per mile for the construction of the herein above-named principal road, THEN said Atchison, Topeka and Santa Fé Railroad Company shall proceed to construct such branch to such intersection, on the terms and conditions herein above prescribed applicable to the construction of such main road.

CONGRESS REFUSED TO EXTEND EMPORIA BRANCH NORTHWARD.

Congress did *not consent* thus *to extend the branch* nor to give the A., T. and S. F. Co. the right to make it, but made a grant for an *independent* road from Emporia to the Union Pacific road near Fort Riley by an act passed July 1, 1864. (respondent's proofs, 26.) Thus, in *M., K. and T. Co.* v. *Kansas Pacific Co.*, 97 U. S., 491, the court, per FIELD, J., says:

> On the 3d of March, 1863, Congress passed an act granting lands to the State of Kansas to aid in the construction of certain railroads, one of which was to extend from the city of Atchison, via Topeka, the capital of the State, to its western line, in the direction of Fort Union and Santa Fé, New Mexico, with a branch down the Neosho Valley to a point where the Leavenworth and Lawrence entered it. In accepting the act, in February, 1864, the legisla-

ture of Kansas enacted that *if Congress, before the 4th of March, 1866, should consent* that the Neosho Valley branch of the road *be extended* so as to intersect the Union Pacific road, Eastern Division, at or near Fort Riley, and should make a grant of lands for such extension of like amount with that granted per mile for the construction of the main road, then the Atchison, Topeka and Santa Fé Railroad Company should proceed to construct such branch. The act thus suggested Congress DID NOT PASS; but on the first of July, 1864, did pass an act making an additional grant of land for the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch of the Union Pacific Railroad.

The act of Congress of July 1, 1864, "making an additional grant of lands to the State of Kansas to aid in the construction of railroad and telegraph lines" (13 Stat., 339; Respondent's Proofs, 26), provides—

> That there be, and hereby is, granted to the State of Kansas, to aid in the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: *Provided*, That this grant shall be subject to all the provisions, restrictions, limitations, and conditions in regard to selection and location of lands, and otherwise, of an act of Congress approved March 3, 1863, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State:" *Provided*, That said railroad shall be a public highway, and shall transport troops and munitions of war of the United States free of charge.

This act by its very terms required an *acceptance* by the legislature of Kansas to make it operative.

The M., K. and T. Co. was not then in existence; it was not organized until September 20, 1865.

Though the *State had never accepted* the grant made by the act of July 1, 1864, and never conferred its privileges on the A., T. and S. F. Co., this latter company undertook not only to *claim*, but to *sell*, its benefits.

ACT OF JULY 1, 1864 INOPERATIVE.

The act of 1864 was inoperative because *not accepted* by the legislature of Kansas. Thus, in *M., K. and T. Co.* vs. *Kansas Pacific Co.*, 97 *U. S.*, 499, the court, per FIELD, J., says:

> This act of 1864 *was never accepted by the State* of Kansas. No route of a road between the points designated in it was ever located by the company, nor was any map of a proposed route ever filed in the Department of the Interior. Nothing, indeed, was done by the State or company under the act until after *the grant it offered had been* SUPERSEDED by the acceptance of the greater and more valuable grant made by the subsequent act of July 26, 1866, which covered the lands.

THE A., T. & S. ASSIGNMENT OF MARCH 19, 1866.

On the 19th March, 1866, the A., T. and S. F. Co. attempted to transfer to the M., K. and T. Co., then known as the Union Pacific Railway, Southern Branch, as the assignment says (printed record, 86; respondent's proofs, 37, 40):

> All the rights, titles, and interests, *franchises*, authority, privileges, immunities, and liabilities, held,

acquired, possessed, and enjoyed, for constructing, maintaining, operating, and enjoying a railroad from *a point on the Union Pacific Railroad, Eastern Division*, at or near *Fort Riley, down the Neosho Valley, to where the Leavenworth, Lawrence and Fort Gibson Railroad* (L., L. and G. Co.) *may* ENTER THE NEOSHO VALLEY, which rights, titles, interests, franchises, authorities, immunities, and liberties, accrued to and became vested in the parties of the first part [the A., T. and S. F. Co.] by virtue of its acceptance of the provisions of the act of the legislature of the State of Kansas above recited [Act of Feb'y 9, 1864, respondent's proofs, 36], and its promise, covenant, undertaking, and agreement to do and perform all and singular the requirements and conditions of said act of said legislature, and the acts of Congress hereinbefore recited [Act March 3, 1863, respondent's proofs, 27; act of July 1, 1864, respondent's proofs, 26; 13 Stat., 339], and referred to, and in compliance by the party of the second part with the terms, requirements, and conditions of the above recited acts, the party of the first part authorize and empower the party of the second part to receive, hold, and enjoy any lands, property, or effects applicable to the construction of a railroad between the points aforesaid, as fully and completely as the party of the first part might have held and enjoyed such lands, property, and effects had this assignment or transfer never been made."

The "assignment" recites the acts of Congress of March 3, 1863, and July 1, 1864, with a *whereas*, that—

> The legislature of the State of Kansas, by its act entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads

and telegraphs in said State and to apply the same in the construction of such railroads and telegraphs," approved February 9, 1864, *did accept the grant of lands so made by Congress.*

GIVES NO POWER TO MAKE ANY BRANCH.

It is important to notice this *alleged acceptance*, which was no acceptance of the act of 1864, by an act of the legislature *passed three months and nineteen days previously.* It is thus certain that the A., T. and S. F. Co. did not attempt to assign to the M., K. and T. Co. *the right to make* THE EMPORIA BRANCH, but a right to make a TRUNK LINE ROAD *from Fort Riley to Emporia under the act of* 1864, and to extend THIS ROAD by virtue of the act of 1863, to the point (COLONY):

> Where the Leavenworth, Lawrence, and Fort Gibson Railroad [L., L. and G. Co.] may ENTER the Neosho Valley.

In the assignment the M., K. and T. Co. *did not* undertake to make the EMPORIA BRANCH, but to make a trunk line road *from:*

> "A point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley down the Neosho River Valley to where the Leavenworth, Lawrence and Fort Gibson Railroad may ENTER said valley" [Colony].

That is, the *contract* was to build *one line of road*, which SHOULD CONNECT WITH THE UNION PACIFIC ROAD—a road which Congress had refused to consent to be made as a branch of the A., T. and S. F. Co. The contract is not

Severable—it is to make *one line of road entire*, and by virtue of the acts of 1863 and July 1, 1864.*

ACT OF JULY 1, 1864, SUPERSEDED.

The legislature having *refused to accept* the grant made by the act of July 1, 1864—having refused to confer any *assignable*, or *any other* rights under it, on the A., T. and S. F. Co., Congress, by the act of July 26, 1866, 14 Stat., 289, *superseded* said act of July 1, 1864, under which the M., K. and T. Co. *acquired the only rights it has to lands.*

THE EMPORIA BRANCH NOT SUPERSEDED.

But it is important to notice that the provision of the act of March 3, 1863, requiring the construction of the Emporia branch was not superseded. This will be more fully shown hereafter.

KANSAS JOINT RESOLUTION, FEBRUARY 26, 1867.

Notwithstanding the fact that Congress had *superseded* the act of July 1, 1864, the legislature of Kansas *attempted* BY RESOLUTION of February 26, 1867 (respondent's proofs, 42), *not* a *legislative act* to *ratify* this assignment above mentioned without the assent of Congress. The resolution *recites* that the assignment gave to the Union Pacific Railway Company, Southern Branch, [M., K. T. and Co.] the privileges—

> For constructing, maintaining, operating, and enjoying a railroad from a *point on the* Union Pacific Rail-

* The claims which the M., K. and T. Co. subsequently made for *granted* and *indemnity* lands under the act of 1864, and which were *allowed*, as shown hereafter, show that the contract was intended to require one line of road to be made, but no *branch*.

road, Eastern Division, at or near Fort Riley, down the Neosho Valley to where the Leavenworth, Lawrence and Fort Gibson Railroad [the L., L. and G. Co.] may INTERSECT the Neosho Valley" [the privileges of the act of July 1, 1864].

With this statement of facts the proposition above stated is now maintained, to wit:

THESE STATUTES, THE ASSIGNMENT BY THE A., T. AND S. F. CO., AND PROCEEDINGS MENTIONED, GIVE THE M., K. AND T. CO. NO RIGHT TO INDEMNITY LANDS, FOR REASONS HEREAFTER STATED:

It will be convenient to consider:

I.—THE ASSIGNMENT UNAIDED BY THE KANSAS RESOLUTION; and then

II.—THE EFFECT OF THE RESOLUTION.

I.

The assignment, unaided by the resolution of the legislature, is void, and hence gave the M., K. and T. Co. no right to indemnity lands.

The *assignment* was an admission that *without it* the M., K. and T. Co. could claim no land-grant rights under the act of 1863. The claim is that by the assignment, the M., K. and T. Co. acquired the land-grant rights of the A., T. and S. F. Co. in the EMPORIA BRANCH.

There are several reasons why the assignment—the contract therein made—is void:

I. *The A., T. and S. F. Co., by accepting the grant* (Respondent's Proofs, 36; Printed Record, 59) *for a* TRUNK LINE, *and for the* EMPORIA BRANCH, *assumed an obligation to make and operate the branch, including the*

obligation to the United States imposed by section 3, of the act of 1863, to operate said road and branch "FOR THE USE OF THE GOVERNMENT OF THE UNITED STATES, FREE FROM ALL TOLL OR OTHER CHARGE UPON THE TRANSPORTATION OF ANY PROPERTY OR TROOPS OF THE UNITED STATES." This obligation was one *to the United States*, and the obligor in a contract cannot by his own act relieve himself of liability. He cannot enact and legalize *repudiation*. The Kansas act of February 9, 1864, accepting the grant of 1863, imposes the obligation in the form of a contract:

> In consideration that the Atchison, Topeka and Santa Fé Railroad Company * * * shall construct a railroad [its trunk line] WITH *a branch* [the Emporia branch], the State of Kansas agrees to grant, bargain, and sell to said A., T. and S. F. Co. * * * the lands granted [for said road and *branch* to the State].

The company accepted both these acts February 16, 1864. (Respondent's Proofs, 36; Printed Record, 59 [106].)

Here then was an obligation *to the United States* to construct a road *with a branch* AND *carry the troops and property of the United States free of charge*. It requires no argument to show that this obligation to the United States cannot, without the consent of the United States, be assigned away by the A., T. and S. F. Co. The Government cannot be compelled to accept the obligation of another railroad company.

It cannot be said the United States is a stranger to the consideration of the contract, and so can be deprived of

all rights under it without its consent. The United States *gave the consideration.* The State was the mere agent or trustee of the United States to *designate the railroad company* to execute the contract.

Thus, in *Rice* v. *Railroad Co.*, 1 Black, 379, the court, in discussing a land-grant act, said the *State*

> Acquired but a mere naked trust or *power* to dispose of the lands and carry out the contemplated public improvements therein described.

But if the United States were even a stranger to the consideration, it has a *vested interest in the contract*, and can maintain an action for its non-performance by the A., T. and S. F. Co. Thus, in 1 Parsons on Contracts, 390, it is said:

> In this country the right of a third party [a stranger to the consideration] to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted [than it was in England at an early day], and perhaps it would be safe to consider this a *prevailing rule with us.*

And even in England, at an early day, when the general rule was otherwise, it is said:

> It would generally be held inapplicable where the beneficiary [as the United States in this case] *has any concern* whatever in the transaction. (1 Parsons, 390.)

II. *The beneficiary of a land grant and indemnity rights has no power to assign away such rights without the consent of the United States, the donor of such rights.*

It has been forcibly and properly said: "By the grant the United States had appointed the State trustee, with

power to name the beneficiary. The State named the Atchison, Topeka and Santa Fé Company. That company could accept the grant or refuse it. But it could not accept *part*, and appoint another company to accept the rest. But this is precisely what it attempted to do. By the assignment to the Missouri, Kansas and Texas, it surrendered its right to build the branch, and *attempted to name another beneficiary*. This it clearly could not do, for the power to name the beneficiary was *vested in the State* by the terms of the grant. The assignment, therefore, conferred no rights upon the Missouri, Kansas and Texas Company.

This is so plain a proposition that it needs no elaboration. It is conceded by counsel that the assignment from the Atchison, Topeka and Santa Fé to the Missouri, Kansas and Texas, standing alone, as the mere act of the parties *inter se*, amounts to nothing whatever."*

If the A., T. and S. F. Co., could assign away its obligation to make the *branch*, and to carry troops and property of the United States free of charge, it could equally sell out its obligation to perform the same duty on the *trunk line*, or could have *divided* this line between two independent—and for that matter insolvent—companies, and thus have escaped all duty and all liability.

The assignment—with the obligation of the A., T. and S. F. Co.—could as well be made without land-grant rights as with them, and as well *after* the construction of the branch, as *prior* thereto. And if the obligations connected with the *branch* could be so assigned, those connected with the main line could equally be assigned.

* From brief of Hon. George R. Peck.

III. *The assignment was void because it provided for the destruction of* (1) *the* UNITY *of the A., T. and S. F. road and branch as one united system, including the trunk line* and *branch*, under one management, as required by the act of 1863, and (2) void because providing for a *distinct line* of road, having no element of a branch. On this subject it has been forcibly said: "To determine the legal effect of the assignment from the Atchison, Topeka and Santa Fé Company to the Missouri, Kansas and Texas Company it is necessary to go back to the act of March 3, 1863. The State, as trustee, with power to name the beneficiary, had designated the Atchison, Topeka and Santa Fé to build one of the two roads provided for by the act. Each of the two roads was to have a branch reaching to the other, thereby interweaving the two into a homogeneous system. Congress required as a condition of its grant that the branches, as well as the main lines of these roads, should be built. Congress alone could absolve the company from its obligation to build the branch. Over and over again Congress declared that the roads to be built should have branches.

"1. In section 1 the granting clause explicitly lays down the course, direction, and *terminal* point of the branches.

"2. In section 1 it is also declared that 'the lands hereby granted for and on account of said roads and branches severally shall be EXCLUSIVELY applied to the construction of the same, and FOR NO OTHER PURPOSE WHATEVER.'

"3. In section 3 it was declared 'that the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof for the purpose aforesaid, AND NO OTHER.'

"Now, unless the Missouri, Kansas and Texas can claim to be a branch of the Atchison, Topeka and Santa Fé Railroad it cannot claim any rights under the act of 1863, or under the assignment from the Atchison, Topeka and Santa Fé. Congress intended to *have a branch* down the Neosho Valley—*not a railroad simply*, but a *branch of the Atchison, Topeka and Santa Fé.* A branch of a railroad is as much a part of the railroad as a limb of a tree is a part of the tree. The intention of Congress was clearly expressed. It proposed to have the road AND *the branch* as a SINGLE SYSTEM. As Mr. Hutchings has well said: 'As well might they have assigned the main line to an independent road, and kept the branch.' The right to assign the one is as clear as the right to assign the other."*

It has been distinctly and emphatically decided by the supreme court of Kansas that Congress intended by the act of 1863 to have two *distinct* systems of road, each entire in itself, with a *trunk line* AND a branch as part of and in connection therewith. Thus, in *Neer* v. *Williams*, 27 Kansas, 1, BREWER, J., said:

> Looking now at the act of 1863, under which, as stated, the patent purports to have been issued, it appears that it contemplated a land grant for TWO ROADS—*one* from Leavenworth, *via* Lawrence, to the southern line of the State; the *second* from Atchison, *via* Topeka, toward the southwest of the State, WITH a branch down the Neosho Valley to a connection with the first road.

This feature of the case will be further considered hereafter, and reference is made accordingly. (See *post*, p. 76.)

* Peck's brief.

IV. *The assignment is void because it provides for the construction of a road, which neither the A., T. and S. F. Co. nor the M., K. and T. Co. was authorized to make,* and which never was made. The A., T. and S. F. Co. having accepted the land grant and indemnity rights of the act of 1863 (Record, p. 59), was authorized and *required* to make its *trunk line* AND *the Emporia branch.*

The M., K. and T. Co., having accepted the act of July 26, 1866 (Record, 76), was authorized to make its trunk line, and did make it. The assignment did not provide for making the Emporia *branch,* nor for a road *merely beginning* at Emporia, to run south in the direction of the *branch,* but *for one entire line of road beginning on the Union Pacific road near Fort Riley and running southward to the point where the Emporia branch* SHOULD HAVE *terminated, but did not.* The assignment *assumed a right* to make *such* ROAD under the *authority of the act of July* 1, 1864. But, as already shown, this act of 1864 was *never accepted* by the State; it was *superseded* by the act of July 26, 1866; it was inoperative, and gave no authority to make *the road* provided for in the assignment. The M., K. and T. Co. therefore undertook to make A *road* which *no law authorized to be made.* Not only so, but as already shown, Congress was *invited* by the Kansas act of February 9, 1863, to "*consent* that the [Emporia] Neosho Valley *branch* of the * * * [A., T. and S. F. Co.] *may be extended* [northward] so as to intersect the Union Pacific Railroad * * * at or near Fort Riley," and to "make a grant of land for such extension." This *Congress refused to do—refused* to permit the *Emporia branch to be ex-*

tended or changed. Here, then, was a *contract* in the assignment to *make a road not only not authorized,* but inferentially *prohibited,* by Congress.

The contract is *not severable,* it is for *one entire line* of road. *A contract to make a road without authority of law is void.* The making of such road would be an *illegal act.* The court will not enforce a contract growing out of and connected with an illegal act.

And, as *already shown* above, the "assignment" having recited *the Act of July* 1, 1864, as the *only one* under which *power* was given to make the road, the *law* will not *refer* the contract to any *other power,* nor permit it to be so referred. (*Bradish* v. *Gibbs,* 3 Johns. Ch., 551, and other authorities above cited.)

If the M., K. and T. Co. made *that road* under the assumed authority of *the act of* 1864 it was unlawful, and the company can acquire no land grant or indemnity rights therefor. If the road was made by the M., K. and T. Co. under the authority of the act of July 26, 1866, then it has not made *the road* required by the contract; it has not complied with the contract, and can claim nothing under it.

The record, (print, 61) shows that the Secretary of the Interior, January 7, 1867, decided that the M., K. and T. Co. had *some* rights, but not THE rights now claimed, under the act of July 26, 1866, AND *none under* the act of March 3, 1863, and none under the act of July 1, 1864. But the indemnity selections now in controversy were finally made under the act of 1863.

The M., K. and T. Co. having failed to make the entire line of road required by the contract of assignment—hav-

ing, in fact, stipulated to do an illegal act—can claim no indemnity lands under the contract.

V. *The M., K. and T. Co. can claim no indemnity lands for* THE ROAD IT DID MAKE UNDER *the act of* 1866, *because* THAT ROAD *was not a compliance with the contract made in the assignment.* It was a different road. Even if indemnity lands could be claimed under the act of 1864, it is subject to all the provisions of the act of 1863, which prescribes the *mode* and *time* of *selecting* them, and declares how and when the State may grant them to the railroad company:

> And *when* the governor of said State shall so certify, *and the Secretary of the Interior shall be satisfied*, that the WHOLE of said roads and branches and telegraph are completed in a good, substantial, and workmanlike manner, as first-class railroads and telegraph, the said State may cause to be sold [granted to the railroad companies] all the remaining [the indemnity] lands granted and *selected* for the purposes indicated in this act situated within the said limits of twenty miles, &c.

Now the WHOLE of THE road provided for in the contract of assignment has never been made. This is an insuperable objection to a claim of indemnity lands under the act of 1864. Another fatal difficulty is that *no selection* was made or authorized by the Secretary of the Interior under that act.

And none can be claimed under the act of 1863, because the contract as made in the assignment was for an *entire road*, and the whole road has not been made under the act of 1864.

Indemnity lands are not earned by making part of a road.

If the road south of Emporia as made was a branch—as it is not—yet the *contract* was not that the M., K. and T. Co. should have either granted or indemnity lands unless the entire road was made *under the authority recited in the assignment.*

VI. A corporation has no power, in the absence of positive legislation, to assign or divide up any of its franchises and "sell them out by piecemeal."

Thus, in *Cox* vs. *C. P. & Ia. R. R. Co.* (10 Ohio St., 387), the court cite with approval the ruling that—

> The franchise to be a corporation is not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be made.

Hall vs. *Sullivan R. R. Co.*, 22 Law Rep., 140; *Bank* vs. *Edgerton*, 30 Vermont, 190. And in *East Alabama R. R. Co.* v. *Doe*, 114 U. S., 340, the Supreme Court said:

> The corporation could not have made a voluntary conveyance of the right of way *severed from* its franchise.

And this is especially so as to this corporation. The original charter of the A., T. and S. F. Co. is not before the court; nor is it material.* Its *powers* and *franchises*, whatever they may have been, were *enlarged, modified, and controlled* by the act of March 3, 1863, the Kansas act of February 9, 1864, and the acceptance of these by the

* The charter has been filed since this was written. It *expressly* requires THE company to construct a road, "and also to construct a *branch* of SAID railroad."

company. *It derived sundry of its powers from Congress.* This fact is recognized in the assignment, which (Respondent's Proof, 40; Printed Record, 47), referring to the franchises of the A., T. and S. F. Co., mentions them as—

> Rights, titles, interests, franchises, authorities, immunities, and liberties accrued to and became vested in the parties of the first part [the A., T. and S. F. Co.] by *virtue of its acceptance* of the provisions of the act of the legislature of the State of Kansas above recited [act of February 9, 1864], and its promise, covenant, undertaking, and agreement to do and perform all and singular the requirements of said act of said legislature *and the acts of Congress* hereinbefore recited.

Without the acts of Congress the company could not have made either the road or branch. It is clear, therefore, that the *franchise was given* to make the road and branch by Congress and the *legislature*, and the company merely *accepted* the franchise so given.

It necessarily follows that neither the company nor the legislature of Kansas can, without the assent of Congress, *divide up* and grant to another corporation a *part* of said franchise.

II.—The joint resolution of the Kansas legislature of February 26, 1867 (Respondent's Proofs, 42), does not validate the assignment; the resolution is void.

This is so for several reasons:

I. *It does not profess to ratify the assignment of any right to receive either granted or indemnity lands.*

The resolution as affecting a land grant or indemnity rights is to be *strictly construed.*

It does not in terms profess to ratify an assignment of the right to granted or indemnity lands accruing to the Emporia branch, nor to any lands, but only—

"Of all the rights, title, interest, authority, privileges, immunities, and liberties held, acquired, possessed, and enjoyed" [not to get *any land* grant—not at all to make the *particular* road *and branch* in question or get any lands therefor—not to make any *branch* of a road as the law required 'from the city of Atchison, *via* Topeka, * * * to the western line of the State, in the direction of Fort Union and Santa Fé,' but only the right] "for [1] constructing, [2] maintaining, [3] operating, [4] and enjoying a [totally different road and no *branch*] railroad from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, down the Neosho Valley to where the Leavenworth, Lawrence and Fort Gibson [L., L. and G. R. R.] may intersect the Neosho Valley."

There are just *four* rights, the assignment of which is attempted to be ratified.

Not one word is said about consenting to a transfer of the *right to land.*

The branch became less valuable to the A., T. and S. F. Co., after the act of 1866 authorized the M., K. and T. Co. to make a road down the Neosho Valley. The M., K. and T. Co. would be benefited if the branch should not be made. It might well agree to run its road near a portion of the line of the branch even without any land-grant privileges.

II. Without this, the act of the A., T. and S. F. Co., in attempting to make an assignment, was void for *want of any assignable right.* It had earned no indemnity

lands. It has never earned these. It was an attempt to assign a *naked possibility*, which cannot be done.

Congress so made the act of March 3, 1863, that the *possibility of an interest* in some of the indemnity sections was proffered to the A., T. and S. F. Co. There may be in some cases a "*vested* possibility of an interest," or a "*naked* possibility of an interest" not yet vested.

But a "vested possibility" is not a title.

Comegys vs. *Vasse*, 1 Pet., 193, 213; 1 Parsons' Cont., (6th ed.), 523; *Jones* vs. *Roe*, 3 Term R., 88; *Carleton* vs. *Leighton* 3, Meriv., 667.

As to the odd indemnity sections, the State of Kansas had the "possibility of an interest"—a right to obtain a title on the happening of contingencies.

But this possibility never *vested*—it was always contingent.

The company had no *vested* or *saleable* title, because its interest in the lands might never be, as it was not, so perfected as to vest a title. This interest, if it may be so called, was somewhat like "the expectancy of an heir presumptive or apparent (the fee-simple being in the ancestor), which is not an interest [so vested as to be] or a possibility capable of being the subject of a contract" of sale. (1 Parsons' Cont. *ubi supra*, note (l).)

In *Hart* vs. *Gregg*, 32 Ohio St. R., 502, it was decided that—

> The conveyance by a son of his expectancy in land owned by his father, which would descend to him if he survived his father, and the latter should die intestate owning the same, is the conveyance of a *mere naked possibility* not coupled with an interest, and passes no estate or interest in the land.

In *M., K. and T. R. R. Co.* vs. *K. P. R. R. Co.*, 97 U. S., 497, it is said:

> To the *validity of such transfers* * * * there must exist a present power of *identification* of the land; and * * * where no such power exists, instruments, with words of present grant, are operative, *if at all* [as they are not], only as contracts to convey.

The land in controversy *never* was *identified* as earned. As to indemnity lands never earned, never *identified*, never selected, there could be no passing of any title.

III. *If there solution, as claimed by defendant, attempted to validate an assignment by the A., T. and S. F. Co. to the M., K. and T. Co. of the rights and obligations of the former in and connected with the* EMPORIA BRANCH, *it is unconstitutional and void, as impairing the obligation of the A., T. and S. F. Co. to the United States to carry its troops and property free of charge.*

1. When the A., T. and S. F. Co. accepted the grant made by the act of 1863, as it did February 16, 1864 [Printed Record, 59; Respondent's Proofs, 36], it thereby assumed the obligation imposed upon IT by that act to maintain and operate the branch as a highway—

> For the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States. (Act 1863, sec. 3.)

This was an obligation of the A., T. and S. F. Co., and no other. The United States never consented to a transfer of that obligation to *another* railroad company.

The United States is within the clause of the Constitu-

tion which prohibits a State from passing a law impairing the obligation of contracts.

And if this were not so, the legislative power of a State, on principles of constitutional limitation, does not extend to the divesting of the rights of the United States by a statute of a State. A power to do this would be a power to destroy the National Government.

2. It is urged on behalf of defendant, that the Legislature of Kansas could have designated *one* company to make the *trunk* line Atchison, Topeka, and Santa Fé road, and *another* to make the Emporia branch. But if this could have been done originally, as it could not, yet *having designated* ONE company, the A., T. and S. F., to make *both* the road *and* branch, the United States thereby acquired vested rights which the Legislature of Kansas could not subsequently divert.

3. In this connection it may also be said the act of 1863 gave to the A., T. and S. F. Co., after its acceptance of that act, a *discretionary* power to *select the line of location* between Emporia and Colony. This discretion conferred by Congress for the benefit of the United States could not be transferred by the legislature of Kansas to any other company. Such transfer would be an invasion of a vested right of the United States which cannot be divested without its consent.

IV. *The State of Kansas having by its act of February* 9, 1864 (*Respondent's Proofs* 32), *in pursuance of the act of Congress of March* 3, 1863, *designated the A., T. and S. F. Co. as the beneficiary under these acts, and this company having accepted the land grant and indemnity rights given and obligations imposed by said acts, the power of the State*

was exhausted, it was FUNCTUS OFFICIO, *and could make no other designation of a beneficiary.*

Congress might, at least with the assent of the State, have imposed the duty of designating a beneficiary on the governor of the State, as it imposed on him the duty of issuing patents. The *extent* of the authority of designating the beneficiary is the same, whether given to the governor or the legislature. In either case a "special tribunal is created with limited power and a particular jurisdiction," and in such case "whenever the power given is once executed the jurisdiction is exhausted and at an end."

Thus, in *Ex parte* Randolph (2 Brock, 473), in discussing the power of an Auditor in the Treasury Department, it is said:

> After the Auditor shall once have settled an account of a public officer, *and closed it*, as in this case, is it competent *for him* at an after time, upon an allegation of error, or omission, or for other cause, to open it, restate it, and upon the account thus restated, to institute proceedings? * * * I think it is not. * * * I take it to be a sound principle that when a special tribunal is created, with limited power, and a particular jurisdiction, * * * whenever the power given is once executed the jurisdiction is exhausted and at an end; that the person thus invested with power is, in the language of the law, *functus officio.*

This is cited with approval by the Attorney-General in an opinion, May 19, 1862 (10 Op. Att. Gen., 259). See *Marbury* v. *Madison*, 1 Cranch, 157; *Crepp* v. *Durden et al.*, 2 Cowper, 640; *Mills* v. *Collett*, 6 Bingham, 85; S. C., 19 Eng. Com. Law Rep., 11–14.

The same principle has been recognized by the Supreme Court.

Thus, in the case of the *United States* v. *Bank of the Metropolis* (15 Pet., 400), it appeared that Mr. Barry, as Postmaster-General, had made certain allowances in favor of a contractor, and a question was presented as to the duty of his successor to disallow the same. The court said:

> The successor of Mr. Barry had the same power [as], and no more than, his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the Department.

The same *principle* has been applied in the executive administration of land grants.

On May 10, 1869, Secretary Cox, of the Interior Department, upon the application of the McGregor and Sioux City R. R. Co. for leave to file a new map of definite location, said:

> After a road has been definitely located, the map thereof filed here and accepted, and the lands withdrawn, no specific authority is given whereby this Department can *accept another location*, and in the absence of such authority I must decline to give my approval to the map now presented.

And it is evidently upon the same *principle* that in *Van Wycke* vs. *Knevals* (106 U. S., 366), the Supreme Court said:

> The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the company. Until the map is filed with

the Secretary of the Interior the company is at liberty to adopt such route "as it may deem best after an examination of the ground has disclosed the feasibility and advantages of different lines." But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established. It is, in the language of the act, "definitely fixed," *and cannot be the subject of future change*, so as to affect the grant, except upon the legislative consent. (See *K. P. Co.* vs. *Dunmeyer*, 113 U. S., 629.)

IV. *The legislature had no power by a* JOINT RESOLUTION *to ratify an assignment; that is, to modify the effect of a statute, as this assignment attempted to do.*

1. The constitution of Kansas, Art. II, sec. 20, declares that:

> SEC. 20. The enacting clause of all LAWS shall be, "*Be it enacted by the legislature of the State of Kansas*, and no LAW *shall be enacted except by bill.*"

The style of the joint resolution is:

> "*Resolved*," &c.

Such legislative action cannot be a *law*.

In *Rogers* vs. *Crane*, 1 West Va., 176, it was declared that—

> The legislature cannot give a matter the force and effect of law by the passage of a joint resolution in relation thereto, when such matter is properly the subject of enactment. Such action being in contravention to the first section of Article IV of the constitution, providing that the style of the acts of the legislature shall be, "*Be it enacted by the legislature of West Virginia.*"

And the court, referring to such legislative action, say:

> It is in conflict with all these provisions of the organic law, and is therefore void.

The constitution of Kansas requires also:

> Art. 2, sec. 15. Every bill shall be read on three separate days in each house, unless, &c.

A joint resolution is not to be read three times, and hence does not rise to the dignity of a law which can change a statute.

In Congress there is *now*, by *special rule*, but little if any difference between an *act* and a *joint resolution;* both are enacted and sanctioned *in all* respects alike. (Joint Rule 10, Smith's Digest, 4th ed., 2d sess. 46th Cong., 192; id., 283; Rev. Stat., sec. 8; Cong. Globe, 3, 27, p. 384.)

And it is said in the Digest (p. 284):

> The early and long-continued practice of Congress indicates that the *framers* of the Constitution * * * construed the constitutional provision, "That no money shall be drawn from the Treasury but in consequence of appropriations made by law," as *requiring the highest character* of law—namely, *bills, not joint resolutions.*

Blackstone says of an act of Parliament:

> It cannot be altered, amended, dispensed with, suspended, or repealed, but in the *same forms*, and by the same authority of Parliament; for it is a maxim in law, that it requires the same strength to dissolve, as to create, an obligation." (1 Comm., 185, 186.)

If there is any substantial difference between the "*form*" of enacting a *bill*, and that of enacting a *joint resolution*, then, under this doctrine and maxim, a joint resolution

cannot alter, amend, dispense with, or repeal an *act* of the legislature. If an act is of greater dignity than a resotion, the latter cannot have the same strength as the former.

2. The constitution of Kansas says:

> Art. XII, sec. 1. The legislature shall pass no *special act* conferring corporate powers.

This joint resolution is an attempt to confer corporate power by a *special* joint resolution not rising to the dignity of an *act* of the legislature.

V. *The legislature had no power to give the lands applicable to the* EMPORIA BRANCH *to an independent company.*

This is shown by the argument already presented (*ante*, p. 63), showing the assignment void because it provided for the destruction of the *unity* of the A., T. and S. F. *road* AND *branch* as one system under one management. In addition, it has been forcibly said: "The road down the Neosho Valley was to be a *branch*, and not an *independent* line. If the legislature in 1867 could give the land to an independent company, it could have done so originally, when it accepted the grant in 1864. That is to say, it could have declared: There shall *not* be a road from Atchison to the west line of the State, with a *branch* down the Neosho to a certain point, as required by the grant, but there shall be two *main lines* under independent control. The grant was the free and voluntary offering of the *General Government.*

"It had the indisputable right to decide for itself the terms and conditions of its benefaction. The State, as

trustee, had no power save to carry out the terms of the grant. If the General Government, in its wisdom, required a branch beginning at the point where the Atchison, Topeka and Santa Fé crosses the Neosho River and terminating at the point where the Leavenworth, Lawrence and Galveston enters the Neosho Valley, the State could not set up its own wisdom against those requirements and ordain that the grant should go to an independent road, beginning at Fort Riley and running to the south line of the State and beyond. Such an act on the part of the State would manifestly destroy the unity of the grant. The road to which the State attempted to divert the grant, instead of being a branch or a part of the Atchison, Topeka and Santa Fé system, was, as its name indicated, allied to another branch, the Pacific system.

"It was called 'The Union Pacific, Southern Branch.' Its northern terminus was at Fort Riley, 'on the branch Union Pacific Railway,' then known as the Union Pacific, Eastern Division, and afterwards as the Kansas Pacific. Its location, name, and history all show that it was intended to connect the Pacific railway system of the North with Texas and the regions contiguous to the Gulf of Mexico. The State manifestly had no power to assist that system by diverting a portion of the grant made to an entirely different system. Congress alone could authorize such a diversion, and Congress never did."*

Does the word "BRANCH" *mean anything?*

On the theory of defendant's counsel, a *branch* means a *road*, and a road means a branch. When the M., K.

*Peck's brief.

and T. Co. asserts a *right* to *granted* and *indemnity lands*, a *portion* of the *one line* of road—

> From Junction City to the southern boundary of the State of Kansas—

becomes the *Emporia branch*, with all the rights of a *branch* of the A., T. and S. F. Co. And claiming, as it does, *under all* the acts of Congress, when it asks again for granted and indemnity lands, *presto*, the same portion of a trunk line that was a branch is *not* a *branch*, but part of a *trunk line* under all the acts.

Thus it boldly claims the *benefit of two grants and indemnity rights* for making *one road* without any branch at all. When Congress says in the act of 1863 that the grant is—

> For * * * a RAILROAD from the city of Atchison, *via* Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, WITH A BRANCH *from where this last-named road crosses the Neosho down said Neosho Valley to the* POINT *where the said first-named road* ENTERS *the said Neosho Valley*—

it uses the words "railroad" and "branch" to signify different things—one a *trunk line*, the other, as it in effect says, a BRANCH of *the trunk line*, connected with and operated under the same management. If Congress had intended *two roads*, separate and distinct, it would have said so.

To hold that an *independent road* is for all purposes the same as a *branch* is not only to confuse terms but to make the words "*road*" and "*branch*" *synonymous*, when

no lexicograghер has made them such, and where Congress did not so intend them.

It would violate all rules of reason and construction to say that *two different words in the same sentence in a statute mean the same thing, when usage has not given them the same meaning, and nothing in or out of the statute indicates an intention to use them as synonymous.*

The word "branch," in its singular and plural form, occurs fifteen times in the act of 1863, and now counsel tells us that Congress simply wanted a road down the Neosho Valley, but had no care whether it was a branch or an independent line. As counsel expresses it:

> The grant, therefore, to aid in the construction of the Neosho branch was complete within itself, it was made for the benefit of that line, and was not dependent upon the construction of any others. (Page 18, respondent's brief, in circuit court.)

This statement certainly has the merit of frankness. We have claimed, and now claim, that Congress, by the act of 1863, marked out two great systems of railroad. Respondent's counsel claim that *four* systems were marked out. Congress certainly intended but two systems, for it NUMBERED them [*first* and *second*], making the one from Leavenworth via Lawrence (with a branch) the *first*, and the one from Atchison *via* Topeka (with a branch) the *second*. Now, the most obvious reason why it must be held that Congress intended to have the road down the Neosho Valley a branch of another road is because it said so. That ought to be reason enough. Construction stops right there, with the plain, simple language of the act. Over and over again the language is "roads and branches."

The main lines are called "roads," and the branches are called branches. But branches of what? Branches of nothing, say respondent's counsel. But a branch necessarily implies a main trunk. There cannot be such a thing as a branch, out in the open air, streaking across the prairie on its own hook. Look at the granting clause:

> Every alternate section of land, designated by odd numbers, for ten sections in width, on each side of said road, *and each of* ITS *branches.*

In the very opening of the act two roads are mentioned, "with a branch" appended to each. For the purpose of sustaining their position that a branch is not a branch, counsel mention the disposition made by the legislature of Minnesota of lands granted under a similar act to the one in question. The legislature of Minnesota is no doubt a very respectable body, but its acts will hardly pass for judicial decisions, and we venture to say they were never before cited as authority in a court of justice. Suppose the legislature of Minnesota did make such a disposition of a land grant; it but shows that Minnesota legislatures are human—like Kansas legislatures. The very question at issue is whether a legislature *can* make such a disposition of lands.

The supreme court of Kansas has explicitly decided that the act of 1863 contemplated *two* railroads instead of *four*. (*Neer* vs. *Williams*, 27 Kans., 1.) The second road, then, under the act of 1863, included, as a part and portion of it, a branch down the Neosho. The theory that the branches were to be independent lines needs but to be touched and it dissolves.

Counsel are quite unfortunate in citing the Pacific Rail-

road acts as sustaining their position that a branch is not a branch. They say:

> A familiar illustration of this is to be found in the Pacific Railroad acts, which created several main lines and numerous branches, all to be constructed by distinct and separate companies.

The very reverse is true. The Pacific Railroad act incorporated *one* company, made it a grant, provided for two branches in section fourteen, but "authorized and *required*" them to be built by the Union Pacific Company. (12 Statutes at Large, page 496.) Congress in the same act made grants to other companies, already existing under State laws—not as branches, but as separate roads, with provisions for forming connections for continuous operation. So far wrong are counsel as to the Pacific acts that they must have overlooked the provision of section 17 of the amendatory act of 1864, in respect to the Sioux City branch, which provides that—

> The said Union Pacific Railroad Company shall be, and hereby is, released from the construction of said branch. (13 Statutes at Large, page 363.)

It appears that Congress considered an express release necessary to absolve the Union Pacific Company from building the branches provided for by the act of 1862. The Pacific Railroad acts are therefore an unpromising field for assistance to maintain the theory that a branch is not a branch. Equally without merit is the argument that the branches were independent of the main lines, based on the language:

> The lands hereby granted for and on account of

said roads and branches *severally* shall be exclusively applied to the construction of the same and to no other purpose whatever.

The declaration that the lands are to be used "*and for no other purpose whatever*," one would think settled the question that the lands granted for building branches should be used for building branches and not for building independent lines. But counsel discover in the word "severally" a declaration that the roads and branches did not constitute a system of roads, "but each by itself and without the others." Undoubtedly certain lands were granted for building the main lines and certain other lands for building the branches, because the grant was to be adjacent and contiguous to the constructed lines, in alternate sections. Of course a portion of the lands would be adjacent to the main lines and a portion adjacent to the branches, but this would not transform the branches into independent lines any more than it would change the main lines into branches. As fast as twenty miles either of a main line or a branch was built, a proportionate part of the grant was earned, but the character of the line was not changed, nor could the will of Congress that the roads should have branches be defeated. Counsel say, "the State might have built the roads itself." No doubt it might; but it would have been obliged to build branches to earn the grant for the branches. It is also argued that the State might have given the lands to construction companies to build the lines. This, too, may be admitted, but the great fact remains that whatever agencies the State might have employed, the result must have been, in

order to earn the grant, that the *branches* should be *branches.*"*

VI. *The "assignment" and "resolution" attempting to ratify it, and thus to take from the A., T. and S. F. Co. the granted and indemnity lands intended for its Emporia branch, and give them to the M., K. and T. Co. was expressly prohibited by law.*

The act of March 3, 1863, declares in a *proviso* to section 1:

> That no part of the land granted by this act shall be applied to aid in the construction of any railroad or *part thereof* for the construction of which *any previous* [that is, any other] *grant of land or bonds* may have been made by Congress.

Now, before any rights could attach for the M., K. and T. Co. (as it is claimed they did February 26, 1867, by the Kansas ratification Resolution of that date), a "PREVIOUS *grant of land*" HAD BEEN made to the State *directly* for the use and benefit of the M., K. and T. Co. *by name*, by the act of July 26, 1866. (Respondent's Proofs, 21; 14 Stat., 289.)

MATERIAL FACTS.

Dates, in *chronological order*, now become material. The act of 1863, sec. 3, made a grant of lands "subject to the disposal of the legislature."

The legislature did dispose of ALL of them to the A., T. and S. F. Co. by act of February 9, 1864, accepted by said company February 16, 1864. (Printed Record, 59; Respondent's Proofs, 36.)

Subsequently, February 26, 1867, the legislature, by

*Peck and Hon. C. F. Hutchings.

its joint resolution, undertook to dispose of a *part* of them *again*, since which it has not attempted to dispose of them any more.

When the legislature did attempt the second time to dispose of the Emporia Branch lands, February 26, 1867, the M., K. and T. Co. had previously received a grant of lands by the act of July 26, 1866 (14 Stat., 289; Respondent's Proofs, 21), which grant said company *accepted August* 8, 1866. (Printed Record, 76; Respondent's Proofs, 91.)

ASSIGNMENT PROHIBITED.

On *these facts* it is clear the M., K. and T. Co. was *prohibited from* taking anything by the joint resolution.

1. The language of the *prohibition* in the act of 1863 is clear, explicit, unmistakable. It requires no construction—the prohibition arises on the *interpretation* of the plain, ordinary, natural, and legal meaning of the words it employs.

But if it be necessary to give construction to language so plain, there can be no doubt of its object. The prohibition is that none of the lands granted by the act of 1863 "shall be applied to aid in the construction of a railroad or part thereof, for the construction of which ANY PREVIOUS grant of lands or bonds MAY HAVE BEEN MADE by Congress."

The *date from which* the term "*previous*" relates must be either:

(1) The date of the granting act, March 3, 1863:

(2) The time at which the State should *designate* the beneficiary; or

(3) The time of the actual *construction* of a road.

The defendant's counsel in the circuit court insisted "that the *proviso* related to grants made prior to 1863.*" This position is untenable.

(1) The *date* to which the term "previous" relates cannot be the *date of the granting act*, March 3, 1863.

(A) If that had been the purpose of Congress the language must have been, on proper principles of *grammatical* construction, "to which any previous grant *has been* made," thus making the *proviso* read:

> That no part of the land granted by this act shall be applied to aid in the construction of any railroad or *part thereof* for the construction of which *any previous grant of land or bonds* HAS BEEN made by Congress.

This reading—"*has been*"—would make the prohibition operative against any company which at the *date of the act* of 1863 had received a grant of lands. The form of expression which Congress *did* employ will work no such result. To give the words "*may have been*" the same meaning as the words "*has been*" would violate grammar.

(B) This is further made certain by the *evident purpose of Congress*, which was to *prevent* ANY *one company* from receiving the benefit of *two grants of land*, for the construction of one road only. Congress intended that *one grant* should secure the building of one road; not that *one* company should have the benefit of two or more grants for building *one road*. The *spirit* and *purpose* of the prohibition concur with its grammatical

* See the able brief of Hon. George W. McCrary and James Hagerman, esq., p. 22.

construction in not *limiting* it to companies which had received a grant prior to March 3, 1863. And certainly there is no equity in permitting the M., K. and T. Co. from escaping the prohibition because the act of July 26, 1866, gave to it BOTH ODD AND EVEN SECTIONS, for indemnity lands, which was a favor no other company received.

(c) The doctrine that *provisos* are to be strictly construed is artificial and not of universal application. Provisos, when *giving* or *limiting* land grants, are, like any other part of a land grant act to be construed as in *L., L. and G. R. R. Co.* vs. *U. S.*, 92 U. S., 740, in which it is laid down that—

> If rights claimed under the Government be set up against it, they must be so *clearly defined* that *there can be no question* of the purpose of Congress to confer them.

The *reason* of this rule applies it to *provisos* in land-grant acts. *One* reason assigned in England, and approved by the Supreme Court in *Dubuque and Pacific Railroad Company* vs. *Litchfield*, 23 Howard, 88, is thus stated:

> The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language *for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms.*

(2) If the date from which the term "previous" relates is the time at which the State *designated* the beneficiary, that prohibits the "assignment" to the M., K. and T. Co. from being operative. The grant to the M., K. and T. Co. was made by act July 26, 1866, accepted by it August 8, 1866.

This antedates the joint resolution of February 26, 1867, under which the M., K. and T. Co. claims the lands in dispute. It cannot claim them, because, when the State *thus* and *then* attempted to designate it as beneficiary, a "*previous* grant of lands" had "been made by Congress."

(3) But the purpose of the *proviso* to prohibit one company from obtaining two grants might by possibility in a given case be defeated even by this construction, and hence it is not the true one.

Thus, to state a supposed case:

1. The act of March 3, 1863, makes its grant with its prohibitory *proviso*.

2. The legislature by its act of February 9, 1864, designates the A., T. and S. F. Co. as beneficiary, and it then accepts.

3. *After* this *designation*, before any lands are actually *applied* under the previous designation, February 10, 1864, Congress, without a knowledge of the designation, makes a grant directly to the same company, which is immediately accepted.

Can the company claim the benefit of both grants? Clearly not. That would defeat the object of the proviso. The proviso operates *prospectively*—as all statutes do, un-

less the language clearly provides in express terms otherwise—and *in effect* says:

> No part of the land granted by this act [of 1863] shall be *applied* to aid in the construction of [*said*] railroad for the construction of which a grant was made by said act of February 10, 1864, previous to any application of lands under this act of 1863.

It follows from these considerations and others hereafter stated that—

The true construction of the *prohibition* is, that it is *operative* at the time when the lands shall be *applied* by the State, or otherwise by authority of Congress; that is, when lands are earned by the actual construction of the road and title passed to the company. The *proviso* upon this construction will read:

> That no part of the land granted by this act shall be *applied* to aid in the construction of any railroad or *part thereof* for the construction of which *any grant of land or bonds* may have been made by Congress [previous to the time when, but for such grant, lands would be applied under this act].

This is the effect of the *words* employed.

The *designation* of a beneficiary by the State is *one thing*, the actual *application* of lands for the benefit of a company is a different thing. The inchoate right to lands accrues when the State passes the act designating a beneficiary; the lands are not actually *applied* until earned and evidence of title given to the company.

By this proviso Congress in effect says:

> The State may pass an act designating a beneficiary: may say what company shall be entitled to

these land-grant rights. But *if at the time when the beneficiary company has completed its road, and asks that the lands shall be actually "applied" for its benefit, it has, at or prior to that time,* received a *land grant,* it shall receive no land-grant rights under this act.

VII. *Legislative constructions, entitled to great respect, have determined that a* BRANCH *cannot be enlarged, or* ITS ROUTE CHANGED, *or be* CONVERTED INTO A TRUNK LINE, *without the authority of Congress; hence the Kansas joint resolution of February* 26, 1867 (*Respondent's Proofs,* 42; *Printed Record,* 92) *is void.*

It is not pretended that Congress has assented to the change made in the Emporia branch, unless by section 11 of the act of 1866, hereafter to be noticed. But Congress has given the highest evidence of its judgment that no such change could be made without its express sanction.

1. Thus the Kansas act of February 9, 1864 (Respondent's Proofs, 32; Laws of Kansas, 1864, p. 149), *asked* Congress to—

> CONSENT that the Neosha Valley branch of the above-named road [A., T. and S. F. Co.] MAY BE EXTENDED so as to intersect the Union Pacific Railroad, Eastern Division, AT OR NEAR FORT RILEY.*

But Congress REFUSED to assent by omitting to pass the desired act. This fact was recognized by the Supreme Court in *M., K. and T. Ry. Co.* vs. *K. P. Ry. Co.* (97 U. S., 491), in language already quoted.†

2. *Then, again, the act of July* 1, 1864, (13 *Stat.* 339; *Respondent's Proofs,* 26), *gave additional evidence that the*

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* See *ante* p. 52. † See *ante* p. 53.

route of a branch road could not be changed without the consent of Congress, by providing as it does, as follows:

> That the branch railroad and telegraph from "Lawrence, by the valley of the Wakarusa River, to a point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho River," to aid in the construction of which a grant of lands was made by the said act of third of March, eighteen hundred and sixty-three, shall be so changed as to run from Lawrence to Emporia, and have and receive the grant of lands made by said act: *Provided*, That the line of railroad and telegraph from Leavenworth, by way of Lawrence and the Ohio City crossing of the Osage River to the southern line of the State, in the direction of Galveston Bay, shall run via Baldwin City.

VIII. *The eleventh section of the act of Congress of July* 26, 1866 (14 *Stat.*, 289; *Respondent's Proofs*, 21), *does not authorize the Kansas joint resolution of February* 26, 1867. (*Printed Record*, 92; *Respondent's Proofs*, 42.)

This section is as follows:

> SEC. 11. That any railroad company chartered under any law of the United States, or any State which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite, and consolidate, with this railroad company, after the same shall be located to the valley of the Neosho or Grand Rivers, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States.

The printed brief for defendant in the circuit court, referring to this section, says:

> In the light of the surrounding facts, it is perfectly clear that the purpose was * * * to legal-

ize the arrangement which is evidenced by the assignment now under consideration.*

This cannot be so for several reasons, any *one* of which is sufficient.

1. *This section of the statute cannot relate to what* HAD BEEN *done, or legalize a* PAST TRANSACTION. *It declares what* MAY BE *done thereafter.*

The rule is well settled that statutes are to be so construed as to operate *prospectively*, and never retrospectively unless required "by express words or necessary implication." (*Murray* v. *Gibson*, 15 How., 421; *Harvey* v. *Tyler*, 2 Wallace, 329; *Chew Heong* v. U. S., 112 U. S., 536.

The assignment was made *March* 19, 1866, four months and twenty-six days before this section was enacted.

2. *This section cannot operate either* RETROACTIVELY *to ratify or* PROSPECTIVELY *to authorize the "assignment" without* REPEALING *the provisions of the Act of March* 3, 1863, *and the Kansas act of February* 9, 1864, *which give land-grant rights to the A., T. and S. F. Co. There is no* EXPRESS *repeal, and none by* IMPLICATION.

One statute is not to be construed as a repeal of another if it be possible to reconcile them. Repeals by implication are not favored. (*McCool* v. *Smith*, 1 Black, 459; *U. S.* v. *Walker*, 22 Howard, 299; *Galena* v. *Amy*, 5

* Brief 29. Of this claim Mr. Peck, in his brief, says: "In the oral argument [in the circuit court] by defendant's counsel, it was not pretended that Congress had ever authorized the diversion of the grant from the Neosho Valley branch, but one of the learned counsel inquired of the author of this brief, while making his oral argument, what was the meaning of section 11 of the act of 1866? It *may be* that counsel will claim that section authorized the transfer of the land to the M., K. and T. Co. Out of respect for counsel I will consider it."

Wall., 705; *Henderson's Tobacco*, 11 Wall., 652; *Arthur* v. *Homer*, 96 U. S., 137; *Chew Heong* v. *U. S.*, 112 U. S., 536; *Red Rock* v. *Henry*, 106 U. S., 596.

3. *This section does not by its* TERMS OR PURPOSE *relate to or affect any land grant or indemnity right.*

It declares that "ANY RAILROAD COMPANY" of certain classes may have certain relations to the M., K. and T. Co., to wit:

1. "May unite" with this [M., K. and T. Co.], "AND,"

2. May "consolidate with this railroad company,"

3. "After the same shall be located TO the valley of the Neosho or Grand River." "May unite AND consolidate" is the language.

It has been properly said that "it is an unusual provision. Probably nothing analagous to it can be found in any other land-grant act."*

It is unusual, because railroad corporations are generally created under State statutes, and their consolidation is provided for by them. The Kansas general corporation statute of February 29, 1868, sec. 47 (Gen. Stats., 1868, p. 202), gives power to every railroad company—

> To cross, intersect, join, and UNITE its railway with any other railway at any point on its route * * * in furtherance of the objects of its connections.

This does not authorize a consolidation.

The Ohio Revised Statutes (vol. 1, 3d ed., 1884, sec. 3379) provide that—

> When the lines of road of any railroad companies in this State, or any portion of such lines,

* McCrary and Hegerman, brief in circuit court, 29.

> have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such continuously, without break or interruption, such *companies* MAY CONSOLIDATE THEMSELVES INTO A SINGLE COMPANY."

The next section authorizes the consolidation of any Ohio company with any one of another State.*

The consolidated company simply becomes ONE corcorporation, succeeding to the rights of the consolidated companies.

These provisions have been considered by the supreme court of Ohio. (*Shields* v. *State*, 26 O. S., 86; *Railroad Co.* v. *Brown*, 26 O. S., 223; *Railroad Co.* v. *Stout*, 26 O. S., 241; *State* v. *Vanderbilt*, 37 O. S., 590; *Railway Co.* v. *Jewell*, 37 O. S., 649.)

Under these, and similar statutes in other States, vast consolidations have been made.

But it is believed, it is safe to say, that *in every instance the* CONSOLIDATION *of two companies has been deemed as merging them into one. The prior companies ceased to exist.*

Now, in view of all this, the purpose of section 11 of the act of July 26, 1866, is plain enough and may be readily stated.

a. Its plain language is "that any railroad COMPANY * * * [of a certain class] may unite AND consolidate with this [M., K. and T.] railroad COMPANY."

* So far as the writer has been able to ascertain, the *first provision*, authorizing one railroad company to "*connect*" and consolidate with any other, is found in the Ohio act of February 25, 1846, "to incorporate the Bellefontaine and Indiana Railroad Company," which was drafted by him.

This means that the two companies become one new corporation.

Thus Webster defines the verb "consolidate:"

> 1. Consolidate. *Lat. consolidare, consolidatum*, from *con* and *solidare*, to make firm, from *solidus*, firm, solid; to *unite* or press together into a *compact mass;* to harden, to make dense and firm; to COMBINE.
>
> 2. *To unite*, as various particulars, into one mass or body.
>
> 3. To unite by means of applications, as the parts of a broken bone, or the lips of a wound.

Thus, construing the statute, according to its *plain words*, a consolidation of companies unites *two companies* into *one*. This is a proper case for the application of the rule that "statutes must rest on the words used, *nothing adding thereto*, nothing *diminishing*." (*L., L. and G. Co.* v. *U. S.*, 92 U. S., 751.)

And the authorities show that the consolidation of two companies creates a new corporation, and the original corporations thereby pass out of existence.

Thus in *Ferguson, Ex'r of Clearwater*, v. *Meredith*, 1 Wallace, 25, the court, in discussing the effect of a consolidation of three railroad companies, said:

> The effect of the consolidation "was a dissolution of the three corporations, and at the same instant the creation of a new corporation, with property liabilities and stockholders derived from those passing out of existence."

(*Wabash, St. L. and P. R. R. Co.* v. *Ham.*, 114, U. S. 595; *State, &c.*, v. *Bailey*, 16 Indiana, 46; *McMahon* v. *Morrison*, 16 Indiana, 172; *Columbus R. Co.* v. *Powell*, 40

Indiana, 37; *Paine* v. *Lake Erie R. Co.*, 31 Indiana, 283; *Prouty* v. *Lake Shore Co.*, 52 N. Y., 363; *Miller* v. *Lancaster*, 5 Caldwell (Tenn.), 514.

b. It was urged for defendants in the circuit court that "by *consolidation* the TWO LINES [of the M., K. and T. and the Emporia Branch] became one, and all the rights of both were united in one company."*

That is, *the claim is* that the *two lines of road, so far as covered by the branch*, were consolidated, and the rights of both vested in *one* of the old companies. There are fatal objections to this theory.

Section 11 above quoted, of the act of July 26, 1866, does not authorize a consolidation of LINES, but of COMPANIES. There has been no consolidation of *companies*. Both the old companies still exist in full operation and of immense proportions.

But even if the statute authorized—as it does not—the A., T. and S. F. Co. "to unite and consolidate [its road] with this [M., K. and T.] railroad," the consolidation would be of two *entireties* into *one*. There is no authority for consolidating a branch of one line with another line, thus severing it from its connection. If this can be done, then one company can cut out a hundred miles of its road and consolidate it with the other road.

c. But the consolidation authorized is of *two companies*, as ENTIRETIES, *into one*, uniting all former interests in a new corporation. This has not been done. A *consolidation* secures a closer union; but the assignment in this case prevents a union, and leaves each of the old compa-

* Brief in circuit court, 31.

nies "to work out its own independent destiny," "discordant, dissevered, belligerent." And in this case if the two companies had been consolidated into one, the new consolidated *company* would have assumed *all the duties and obligations* of the preceding companies. It would be required to construct the Emporia *branch* of the A., T. and S. F. road, *as a branch*, and the trunk lines of both the old companies. "Whatever the M., K. and T. Co. took by assignment from the A., T. and S. F. Co. it took *cum onore*. This is clear law. (*Miller* v. *Lancaster*, 5 Caldwell (Tenn.), 514.) It could not accept the benefits and escape the burdens.

d. Manifestly the assignment was a bold, bald attempt to avoid the obligation imposed by the act of 1863 to make the *Emporia branch*, and the obligation imposed by the act of 1866 to make a trunk line independent of the branch, and to *claim* for the construction of *one* road, required by the act of 1866, the benefits given by that act, and also the benefits given by the act of 1863, as the *consideration* of the construction of the branch without performing the consideration.

e. The opinion of the circuit court in this case states rules which defeat the claim of the M., K. and T. Co.:

> When by separate acts at different sessions of Congress railroad land grants were made to two different corporations or parties, it will not, although the general course and direction of the road named in each act is similar, be presumed that Congress intended that the construction of one road, under an arrangement between the corporations and parties, should secure the benefits of both grants. The latter *supersedes* the earlier, or the two roads must be built

to earn both grants. The act of Congress of March 3, 1863, limited the grant to the building of a road having no other land grant.

f. But it was said in the argument for defendant in the circuit court:

> That the act of 1866 was intended by Congress to be a mere confirmation and renewal of the acts of 1863 and 1864, is shown by the debate in the United States Senate upon the passage of the act [bill].*

It is well settled that the debates cannot be resorted to in aid of the construction of a statute or to indicate the purpose of Congress. (*Aldridge* v. *Williams*, 3 Howard, 1.) And the necessity of this rule is well shown by the mistakes of *fact* and of *law* manifested in the debate.

In the debate Senator Pomeroy said:

> It is no *new grant; every acre* has been granted in a previous bill, and this bill only *consolidates* the *two grants.*

The act of 1863 gave indemnity in *odd sections only.* The act of 1866 gave indemnity in both *odd and even* sections *wherever it was operative.*

If the act of 1866 *consolidated* the *prior grants* for the road down the Neosho Valley AND Emporia branch, so far as it was to go down the same valley, and, as Senator Pomeroy said, made "no new grant," then there is but the *one grant*—that made by the act of 1866. When a second grant is made, covering "every acre" of a former grant, both grants do not stand in force. To so hold would impute to Congress a vain and useless work, which

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* Brief, p. 31.

is not admissible. And if it did it would make only one grant. If the act of 1866 *consolidated* any rights, they are to be judged of *alone* by *that act*. The *consolidation supersedes* what has preceded it. "If the grant of 1863 had attached to lands in place, they were not subject to the act of 1866; but if the act of 1866 is to be upheld as attaching to them, it must be upon the theory that it wiped out the act of 1863."

If, as the argument for defendant claims, "the act of 1866 was intended by Congress to be a mere confirmation and renewal of the acts of 1863 and [July 1] 1864," then the grant for a branch down the Neosho Valley, made by act of 1863, standing on the same footing with the act of 1864, both are *superseded*, as this court has decided the act of 1864 is superseded. It was—

> *Superseded* by the acceptance of the *greater* and more valuable grant made by the subsequent act of July 26, 1866, which covered the same lands. (*M., K. and T. Co.* v. *K. P. Co.*, 97 U. S., 499.)

g. But the act of July 26, 1866, *did* NOT *supersede that provision of the act of* 1863 *requiring the construction of the Emporia branch.* The act of 1866 superseded the act of July 1, 1864, *because* the act of 1864 was *not accepted* by the State of Kansas, nor by any company, at the time the act of 1866 was passed. But the act of 1863, with its Emporia *Branch rights* and *obligations had been* accepted by the *State*, and *by the A., T. and S. F. Co.*, before the act of 1866 was passed. Rights had *vested* in the A., T. and S. F. Co. which even an act of Congress could not divest. The "assignment" of March 19, 1866, recognized the act of 1863, as in force in its *relation* to the Emporia Branch.

The Kansas joint resolution of February 26, 1867, after the act of July 26, 1866, was passed—recognized the obligation to construct the Emporia Branch under the act of 1863. The M., K. and T. Co. by claiming and receiving lands under the act of 1863, for the Emporia Branch recognized said act as in force, and it is *estopped* now from saying the act of 1866 superseded the provisions of the act of 1863, requiring the construction of the *branch.*

4. The eleventh section of the act of July 26, 1866, authorizes any company of a certain class "to connect, unite, and consolidate with the [M., K. and T.] company, AFTER THE SAME SHALL BE LOCATED to the valley of the Neosho or Grand River."

The diagram of the definite *location* of the M., K. and T. road was filed with the Secretary of the Interior *December* 3, 1866 (Printed Record, 58 [104]). The road was not located until this was filed. The so-called "consolidation"—the assignment—was made *March* 19, 1866 (Record, 47 [86]).

The so-called assignment was not authorized because made *before* the location. Congress had a right to insist that the consolidation should not be made until after the location. There must have been some reason for this, but whether so or not, Congress had a right to prescribe the time, and in doing so made any previous consolidation illegal. One reason may have been that the *location should not be influenced* by a previous consolidation.

5. *The consolidation is only authorized between the M., K. and T. Co., and, as the section says,* "ANY RAILROAD COMPANY CHARTERED UNDER ANY LAW OF THE UNITED STATES * * * OR [company which] SHALL HERE-

AFTER BE ORGANIZED BY ANY ACT OF THE CONGRESS OF THE UNITED STATES."

The A., T. and S. F. Co., with which the so-called *consolidation* took place, was not (1) "chartered under any law of Congress," nor was it (2) *thereafter* organized at all, (3) nor was it chartered by any State *and "organized by any act of Congress,"* as section 11 requires.

The section *only applies to corporations which accepted full charter powers from Congress*, and not to mere State corporations like the A., T. and S. F. Co. It does refer to State corporations, but it qualifies the reference by limiting it to those—

> Which may have been heretofore or shall hereafter be organized by any act of the Congress of the United States.

But it was insisted in the circuit court that—

> The language does not refer to railroad companies organized by act of Congress, but to railroad companies chartered by any *State organized* by any act of Congress.*

This is not the true construction.

a. If the section included any corporation theretofore or thereafter organized, either by State law or act of Congress, the section would simply have said—

> Any railroad company heretofore chartered under any law.

But the purpose of Congress was to authorize the M., K. and T. Co. to consolidate with a company deriving its power only from an act of Congress.

This must be so.

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* Brief, p. 73.

b. Congress had no power to authorize the consolidation of two State corporations. And Congress could not give power to any mere State corporation, having been in no way subjected to Congressional control, to consolidate with the M., K. and T. Co. If so, Congress can enlarge the powers of, and grant privileges to, all mere local State corporations, which, of course, cannot be claimed.

The construction contended for by defendant would permit all this, since on *this construction* any local corporation without land-grant privileges might consolidate.

c. To apply the words "which may have been heretofore or shall hereafter be organized by any act of the Congress of the United States," to the words "any State," finds no *sanction* or *precedent* in any act of Congress. States are not *organized* by act of Congress. States are organized by "the people of a Territory by their representatives in convention," and then "admitted into the Union." (Act January 29, 1861, for the admission of Kansas, 12 Stat., 126.)

d. There are examples of State corporations "organized by act of Congress."

Thus the companies "composing the Pacific system—the Kansas Pacific, the Central Pacific, and others, which were originally State corporations, but by national legislation were reorganized with Government directors and under Government control," are of this class.

The A., T. and S. F. Co. has never been "organized by any act of Congress."

THIS COURT HAS NOT DECIDED THE ASSIGNMENT VALID.

There is an allusion to the "assignment" in the case of *M., K. and T. Co.* v. *Kansas Pacific Co.*, 97 U. S., 499, where it is said:

> The A., T. and S. F. Co., with the assent of the State, transferred all its interests in the grant to the M., K. and T. Co.

But the *question* of the legal validity, or effect, of the so-called assignment, so far as appears, was neither argued, considered, or decided; it is an open question.

The conclusion follows that section 11 of the act of 1866 authorizes the consolidation *only* of corporations *deriving* their *powers from Congress*, whether originally chartered by Congress or a State.

FOURTH PROPOSITION.

IF THE ASSIGNMENT BY THE A., T. AND S. F. CO. TO THE M., K. AND T. CO. IS VALID, YET THE LATTER COMPANY ACQUIRED NO TITLE UNDER THE ACT OF 1863 TO THE LANDS IN CONTROVERSY.

This proposition is supported by several considerations.

I. ***A fatal objection to the claim to indemnity lands under the assignment is, that the land now in controversy is not within the twenty-mile indemnity limits of the A., T. and S. F. R. R. or its branch.***

MATERIAL FACTS.

The court takes judicial notice of the official public land surveys, with the designation of rivers, water-courses,

&c. The map of location of the M., K. and T. road, the location of the Neosho River; the sections of land on each side of the road and river, from which distances by land sections are given, are all found in the printed record, 58 [105], with the valley of the Neosho, the location of Emporia, &c.

Another map is in the record (p. 30 [50]), showing the line of the M., K. and T. road; the line of the L., L. and G. road, and the sections of land by which granted, and indemnity limits may be ascertained. The lands in controversy are described in the bill and can be located on the maps.

Among the agreed facts are these (Printed Record, 23, Defendant's Proofs, 20):

> The L., L. and G. R. R. crosses the M., K. and T. R. R. Co. at Chanute, Kansas; at Colony, Kansas, a point 28 miles north of Chanute, the L., L. and G. R. R. "FIRST ENTERS" upon lands from which the natural flow of water is by way of the Neosho River."

It sufficiently appears that the L., L. and G. road ENTERS the valley on the *northeast* side of the Neosho River, but the *point* where the M., K. and T. road intersects the L., L. and G. road is on the *southwest* side of the river, and where the latter road EMERGES from the valley. The *land in controversy* is 18 *miles east of the line of* the L., L. and G. R. R., and hence 18 miles *east* of the *eastern* TERMINUS *of the Emporia, or Neosho* Valley Branch of the A., T. and S. F. R. R.

The land is not within 20 miles of the authorized or even possible LINE of the properly located branch, but is OPPOSITE to the END of the point where the *branch* is required to "*terminate,*" at Colony.

LEGAL DEDUCTIONS FROM FACTS.

1. Now, with these facts, it is clear that even if the "assignment" be valid, the defendant takes no indemnity land by it. The M., K. and T. Co. can take no land which the A., T. and S. F. Co. could not take by its proper construction of this branch.

The A., T. and S. F. Co. could not claim these lands as indemnity, because such lands can only be claimed within 20 miles of the SIDES of the branch, and *not* at its END.

It will be observed that it is not alleged that the land in controversy is within *ten* miles of the *terminal* limits of the *branch*. There is no pretense of the possibility of a grant *in place*. The act of 1863 only gives lands *in place* on EACH SIDE of the road. The END is not the SIDE. And so of the indemnity lands.

It is not even necessary, in order to exclude lands at the *end* of a road from the grant, to invoke the rule as to *construing* public *grants strictly*.

In *M., K. and T. R. R. Co.* vs. *K. P. R. Co.* (97 U. S., 491), it was decided that the grant only passed lands "within specified limits on EACH SIDE of the line" of road.

The grant is of odd sections "on each SIDE of said roads and each of its branches." This grant does not include land at the *end* of a road or branch. The necessary effect of the law, which is to be construed strictly, as already shown, is to exclude from the grant all that is not expressly given in it. The strict construction referred to is followed in the practice of the General Land Office in awarding lands, and is in accordance with the decision of

the Supreme Court in *United States* vs. *Burlington and M. R. R. R. Co.*, 98 U. S., 334. (S. C., 4 Dillon, 297.)

In this case it was expressly decided that the grant did *not* cover lands at the END of a road, but only those "within lines *perpendicular to it* at each end." (P. 34.)

This principle is recognized in *Winona and St. P. R. R.* vs. *Barney*, 113 U. S., 628, where the court, referring to selections of lands under the act of March 3, 1865 (13 Stat., 326), says:

> The *coterminous* principle applies to them, and they are to be selected along and *opposite* the *completed road*.

2. If the *onus* is on the Government to prove that the lands in controversy are outside of the indemnity limits of the branch, it is proved.

But the *onus* is on the *defendant* to prove that the lands claimed have been earned, and are within the indemnity limits, and this is not and cannot be done. Any mere *presumption* which might arise from a *selection* of these lands as indemnity, that they are within indemnity limits, is rebutted by the evidence; but without this is defeated by the proof that the road is not located on the proper route, or with a proper point of intersection of the L., L. and G. road. When it is shown that the location and crossing or connection are wrong, all presumptions arising from the selection of lands fall. The selections were made with reference to *located line* of road, and the locations being wrong the selections are wrong. All this has been shown, and will also be further shown in considering the next head of this brief.

II. *If the* PROPER *construction by the M., K. and T. Co. of a* TRUNK LINE of road *on the true route of the Emporia branch could be accepted as and for the Emporia* BRANCH, *and if the lands were within the indemnity limits, yet said company acquired no legal right to the lands, because the road was not constructed on the proper route and does not terminate at the proper point.*

The Emporia *branch* was required by the act of 1863 to run from Emporia "*down said Neosho Valley to the* POINT *where the said first-named road* ENTERS *the said Neosho Valley.*"

The *terminal* point of the *branch* was at Colony. This would inevitably fix the *general route of the road.* The construction of the road with *Emporia as a point* was an essential *condition precedent* to the right to lands. But the obligation of the company to make Colony and the L., L. and G. road at that place also as *a point was no less imperative* than the location at Emporia. Both were absolute *conditions precedent* to the right to any land.

The road was not so made. It intersected the L., L. and G. road at Chanute, southward 28 miles from Colony. This *deflected* the *line of road* at *that point* 28 miles from the route it should have pursued, and the deflection affected the *whole line*, not only *between Emporia and Colony*, but *for a long distance* at and southward of Chanute.

The *statute* required the road to intersect or connect with the L., L. and G. road on the *northeast side* of the river. It does not, but does so on its *southwest side.* Here was the most flagrant and palpable disregard of the will of Congress.

If the M., K. and T. road had crossed the Neosho 28

miles from Emporia without touching that point would it be claimed this was a substantial compliance with the act of Congress? If the act of Congress had required the branch to commence on the *opposite side of the river* from Emporia can an executive officer nullify that requirement and give lands for a branch commencing on the same side with Emporia? Yet this would have been no greater disregard of the statute and of obligation than occurred at the L., and L. and G. connection or crossing at Chanute.

To call this flagrant violation of law a *substantial compliance* with the statute, to call this substantially *the route* of the branch, is a mockery of terms, if not an insult to common sense. Its sanction would open the way for enormous frauds. Congress agreed to give lands on *one route;* the company chose to reject the promise, and violate its obligation, and make a road on a *different route*, thereby claiming *totally different lands.*

If such *deflections* of route be tolerated, then railroad companies can repudiate grants of *inferior lands*, and by change of route take vastly more valuable lands, which Congress never intended to give, and besides sacrifice the rights and interests of settlers on lands who purchased on the faith that the branch would be made as the statute required.

> When the act of 1863 required the Neosho Valley branch to intersect the L., L. and G. at the POINT where the road *enters* the valley, it distinctly required the intersection to be on the north side of the river, because the L., L. and G. could only enter the valley on that side. Counsel urged that the point was indeterminate. Ganted [for the sake of the argument]. They say it is impossible to decide whether Congress

meant the high or the low lands of the valley. Granted. But *Congress certainly meant* ONE or the OTHER. The actual point of intersection, however, is on *neither*, but on the *opposite side of the river*, where the road begins to emerge from the valley. Suppose the act had said distinctly, "*at same point on the north side of the river*," would counsel claim an intersection on the south side as a "substantial compliance?" But it would be no stronger to say it *directly* than by *necessary* implication. The intersection at Chanute cannot be sustained as a compliance with the act of 1863, *unless the court can decide that north means south*, "substantially." *

Any departure from the POINTS *fixed by Congress* for a road will defeat all land-grant rights, because the construction through SUCH POINTS, and on the prescribed route, is a condition precedent to the right to lands.

This is the effect of the words of the land-grant acts.

Thus the act of March 3, 1863, makes a grant for—

> A railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, *with a branch from where this last-named road crosses the Neosho down said Neosho Valley to the* POINT *where the said first-named road* ENTERS *the said Neosho Valley.*

This prescribes the *general route* of the road, and also requires *more* than this.

It requires an *exact location.*

It fixes the precise *time* when the grant *in præsenti* becomes operative to identify the granted lands, as it says:

> When the line of said road is *definitely located.* (Sec. 1.)

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* Peck and Hutchings.

It requires the company to file with the Secretary of the Interior maps of its line, "*designating the route thereof.*"

These provisions require a *precise definite location.* Then this act refers to the road as one to be *constructed* on this precise line.

The grant is of—

> Every alternate section of land designated by odd numbers [1, 3, 5, 7, &c.] for ten sections in width [10 miles] *on each side of* SAID *road and each of its branches.*

Meaning the road on its *proper location.* The statute says:

> That the land to be so selected shall in no case be located further *than* 20 miles *from the lines of* SAID *road and* BRANCHES.

So there are various *other provisions*, all looking to an *exact line* of *location* and *construction* corresponding therewith.

Finally, if there be any *doubt* as to the proper construction of the statute, it is to be resolved against the railroad claim.

> If there are doubts about * * * the extent of the grant the Government is to receive the benefit of them. (*L., L. and G. R. R. Co.* vs. *U. S.*, 92 U. S., 746.)

The conclusion is inevitable that where the constructed road deflects from the "*points*" required by statute on the route, or even from the line of definite location, no indemnity lands can be selected "*conterminous*" therewith, as the statutes require they should be.

It will be conceded that if a company is bound to construct its road on its line of *definite location* or *lose* its

land-grant rights, it will, *a fortiori*, be required to construct its road through the POINTS fixed by Congress or lose its land-grant rights.

Attorney-General Devens (16 Opinions, 462) has said:

> The * * * inquiry is, whether, if the road be built upon a line different from that of definite location, the lands ascertained by the definite location can now be patented to the State [for the R. E. Co.].
>
> If this could be done, its effect would be sufficiently obvious. A tract of country not receiving the benefit of the road would be charged with the burden of having its lands granted to the railroad company whose road did not accommodate it. Persons owning property in farms or villages, who had purchased with the belief that the road was to be constructed according to the line of definite location, would find that they were in some instances many miles distant from the road the benefits of which they had expected to receive.
>
> In order to entitle the State [for the railroad company] to the benefit of the lands granted it is *necessary that the road should be* CONSTRUCTED ACCORDING TO THE LINE OF DEFINITE LOCATION.

In *Kansas Pacific Railway Co.* vs. *Dunmeyer*, 113 U. S., 634, Justice Miller, in discussing the effect of a similar statute, emphatically says:

> The company makes its own preliminary and *final surveys* by its own officers. It selects for itself the PRECISE LINE ON WHICH THE ROAD IS TO BE BUILT, and it is by law bound to report its action by filing its map with the Commissioner, or rather in his office. The line is then fixed. The company *cannot alter it* so as to affect the rights of any other party. (P. 634.) * * * The company *had no absolute right until the*

> *road was built* [on the line of definite location], or that part of it which came through the land in question." (P. 641.)

The conclusion is inevitable that where a road or branch does not pass through the *points* required by the land-grant acts, the conditions precedent have not been performed which can give any right to indemnity lands.

THE ACTION OF THE SECRETARY OF THE INTERIOR DOES NOT ESTOP THE UNITED STATES.

It may be urged that the Secretary of the Interior has a discretion to permit *such* deflection, or that when he selects lands he waives any right to object, and that the United States is estopped by his action. This cannot be.

a. To say that his sanction of a route can permit a company to disregard and depart from *points fixed in an act of Congress*, is to say that he may in part repeal an act of Congress. It has already been shown that Congress has denied the existence of any power to *change* either the *beginning* or terminal point of a road, or a branch, except by authority of Congress. The courts will not sanction a power in executive officers to repeal an essential provision of a statute. The power to fix the points of a road in a land-grant act is LEGISLATIVE. The power to change them is legislative.

An attempt to do either by executive authority would be to invade the independent power of Congress.

b. The Secretary of the Interior is not charged with any duty in fixing the definite location of a road.

Thus the Supreme Court has said that—

> The act which fixes the line of *definite location* is the act of *filing the map or plat of the line in the office*

> *of the* Commissioner of the General Land Office. * * * Up to that time the right of the company to no definite section or part of section [of land granted in place] is fixed. * * * The right of the company becomes by that act vested. * * * IT IS AN ACT TO BE DONE BY THE COMPANY.
>
> * * * * *
>
> The company makes its own preliminary and *final surveys* by its own officers. It selects for itself the *precise line on which the road is to be built*, and it is by law bound to report its action by filing its map with the Commissioner, or rather in his office. The line is then fixed. (*Kansas Pacific R. R. Co.* vs. *Dunmeyer*, 113 U. S., 634.)

Certainly, if a company would file a map of definite location, which did not pass through *points* required by Congress, it would be the duty of the Secretary to refuse all land-grant aid. (16 Opinions, Attys. Genl., 462.) He would, in fact, in such case, be without power to give such aid.

But he has no power to compel a company to locate its road even through the points fixed by Congress. His illegal selection of indemnity lands therefore settles nothing as to any *proper point* through which a road should run.

When a power is given to be exercised only *on the performance* of *expressly required conditions*, its exercise without such performance is in *excess* of authority and is void.

c. The United States is not *estopped* from controverting the legality of the action of the Secretary of the Interior in selecting indemnity lands. Any such claim is completely denied by a principle laid down in *St. Paul and Sioux City*

R. R. Co. vs. *Winona and St. Peter R. R. Co.*, 112 U. S., 733:

> It is no answer to this to say that the Secretary of the Interior certified these lands to the State for the use of the appellant. It is manifest that he did so under a mistake of the law. * * * This erroneous decision of his cannot deprive the Winona company of rights. * * * (*Johnson* vs. *Towsley*, 13 Wall., 72, 80; *Gibson* vs. *Chouteau*, 13 Wall., 92, 102; *Shepley* vs. *Cowen*, 91 U. S., 330, 340; *Moore* vs. *Robbins*, 96 U. S., 530, 536.)

No error of any officer, either of FACT or of law, can give to an officer power to do what the statute *does not authorize* or make valid, a patent unlawfully issued, when its validity is *directly* attacked in a suit by the United States. This is shown by the authorities just cited.

It is shown by the authorities cited in the circuit court for defendant.*

In *Steel* v. *Smelting Co.*, 106 U. S., 450, the court, in discussing the action of the Land Department in issuing a patent, said:

> Its judgment upon these matters is that of a special tribunal, and is unassailable [where the officers had jurisdiction] EXCEPT BY DIRECT PROCEEDINGS FOR ITS ANNULMENT OR LIMITATION.

There may possibly be cases where the court will not re-examine a question of fact decided by the Interior Department, but where the Department has made a *mistake* as to the existence of a fact, on which the *authority* to give title depends, there the court will, in a direct proceeding, review a mistaken finding of fact.

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* Brief, 44 *et seq.*

In *Moore* v. *Robbins* (96 U. S., 535) the court, in discussing "the decision of the officers of the Land Department," on questions of fact in issuing a patent, said:

> As to *facts* on which their decision is based, *in the absence* of fraud OR MISTAKE, that decision is conclusive, even in courts of justice, when the title afterwards comes [collaterally] in question. But in this class of cases [a bill to determine the right of two claimants], as in all others, *there exists in the courts of equity the jurisdiction to correct* MISTAKES, to relieve against *frauds* and *impositions*, and, in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief.

If it be necessary, it is insisted that here is such evidence of "imposition," or even of legal fraud, as to require the relief prayed for.

The case of *United States* v. *Arredondo*, 6 Peters, 691, only decides that the court will not re-examine the *exercise of discretion*, when the power so to exercise it is given by law.

But here the Land Department had no *power* to change a *point required by statute* in the location of a road. The construction of the road to the proper point was *essential to the existence of the power* to select lands, and an *error* in judging of a fact cannot *create power*.

In *Minter* v. *Crommlin*, 18 Howard, it is shown that a patent may be defeated by showing by evidence of fact *dehors*, the *want of power*.

And referring to the validity of a patent, the court says:

> But this [the validity of the patent] may be rebutted *by proof* that the officers had no authority to issue it, on account of the lands not being subject to entry and grant. * * * It has been so held by this court in many instances. (S. C., 9 Ala., 594.)

In *Polk* vs. *Wendell*, 9 Cranch, 99 it was declared that a patent might be shown to be void by evidence *dehors*. The court say:

> The great principles of *justice* and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the *means* by which an older title was acquired *might be examined.*

And the judgment of the court below was reversed, because it refused to permit a party to *prove by parol* that "warrants were forgeries;" that "entries were never made." The court say:

> In rejecting testimony to these points the circuit court erred, and their judgment must be reversed.

In *Hale* vs. *Gaines*, 22 Howard, 144, evidence *dehors* was received; and it was shown, *as it is in the case now under consideration*, that the claim set up by the plaintiff was—

> Of no value, the land having been *reserved* from sale.

The plaintiff is bound to *know the public law* under which title is made.

In *L., L. and G. R. R. Co.* vs. *U. S.*, 92 U. S., 733, 760, it was conceded on all hands that parol evidence *dehors*

could be received to defeat the patent; *e. g.*, to show that the land was within an Indian reservation.

In *Morrill* vs. *Douglass*, 14 Kansas, 302, the validity of a tax-sale was attacked by parol evidence. It would be fatal to all rights of property if officers could *give themselves jurisdiction* simply by issuing a patent which the law does not authorize, and then say "our acts are conclusive and cannot be impeached." Courts will pause before they open such a door for fraud, swindling, and robbery! Can a sheriff divest a title to a farm by making a deed of conveyance which he has no lawful authority to make? The idea is monstrous.

In *Johnson* v. *Tousley*, 13 Wall., 85, the court said the decisions of the Land Department are only conclusive when "unaffected by *fraud* OR MISTAKE."

The conclusion is irresistible that the United States is not estopped by anything that has been done, but may assert its title in this case.

FIFTH PROPOSITION.

THE M., K. AND T. CO. NEVER ACQUIRED ANY LEGAL OR EQUITABLE TITLE TO ANY OF THE LANDS NOW IN CONTROVERSY UNDER OR BY VIRTUE OF THE ACT OF JULY 26, 1866. (RESPONDENT'S PROOFS, 21.)

Much of the argument in support of this proposition has already been presented showing—

I. The M., K. and T. Co., by accepting a patent reciting the act of 1863 as the authority for its issue, is *estopped* from asserting title under any other statute.*

Ante, p. 29.

II. The entire proceedings of the Land Department were *solely* under the act of 1863, and where a grantee takes by execution of a specified power he can take under no other power.*

III. The *court* cannot in *this action* consider defendant's claims to lands on which the Land Department has not passed,† or on which is has refused to pass, or on which it has decided adversely to the Railroad Company.

IV. That the maxim *falsa demonstratio*, &c., cannot apply here to aid the defendant.‡

V. Other questions more or less remotely connected with this act have been considered above.§

Some of these will be supplemented with additional reasons and authorities, and other and distinct reasons will be presented as follows:

The *main reliance* of the M., K. and T. Co. for title is *now* under the act of July 26, 1866. (14 Stat., 289.)

I. *But this act can give no legal title to the M., K. and T. Railroad Company, because no patent* was issued to it by the Secretary of the Interior, as the statute requires.

The act of 1866 makes a present *grant of lands* in *place*, and with the usual contingent possibility as to indemnity lands, but *enlarged beyond the usual grants* to include both odd and even sections in localities where it can apply.

And it provides that the

> Secretary of the Interior shall issue to the said [M., K. and T.] company patents for so many sections, &c.

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*Ante, p. 31. †Ante, p. 35. ‡Ante, p. 44. §Ante, p. 47.

This is the construction put on said act as to indemnity lands by the Secretary of the Interior. (Letter March 25, 1867, Printed Record 66 [122].) No *patent* has ever been issued by the Secretary of the Interior for any of these lands. The act requires such a *patent* as evidence of legal title; hence, none can pass without it. The fact that no patent was issued by the Secretary of the Interior under the act of July 26, 1866, for the lands now in controversy is some evidence that *this act* has never *been regarded by the United States officials as giving any claim to a title.* But in any event *no legal title* could pass without a patent from the United States.

II. *The M., K. and T. Co. has no* LEGAL *or* EQUITABLE *title to these lands as indemnity lands, because they were not* "SELECTED" *by the Secretary of the Interior as such* UNDER THE ACT OF 1866.

SELECTION UNDER ACT OF 1863.

There were two lists of *portions* of the lands in controversy.

The first was the joint selection Independence list of August 8, 1872, BY the M., K. and T. Co. AND *the L., L. and G. Co.* (Printed Record, 35–47, [63–85].) This was a selection by *the companies.* It was not made by *authority* of the Secretary of the Interior, nor approved by him.

The second is a—

> List of lands * * * within the twenty-mile limits granted to the State of Kansas by the ACT OF CONGRESS APPROVED THE 3D OF MARCH, 1863, ENTITLED "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State,"

designated by odd numbers for ten sections in width, on each side of said railroad, which the United States had not sold, or to which the right of pre-emption or homestead had not attached.

The list of lands is then set out.

This is followed by a certificate of the Commissioner of the General Land Office that it is—

> Shown by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25, 1870, and map therewith duly certified by the governor of the State of Kansas, that the said Missouri, Kansas and Texas Railway Company has fully completed and equipped, AS REQUIRED by THE ACT [of MARCH 3, 1863], the said railroad from Junction City to the southern boundary of the State of Kansas.
>
> And they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of the SAID ACT OF MARCH 3, 1863, subject to all its conditions, and to any valid interfering rights to any of the tracts embraced in the foregoing list.

Then follows:

> DEPARTMENT OF THE INTERIOR,
> *Washington, April* 10, 1873.
>
> Approved, subject to the conditions above named.
> C. DELANO,
> *Secretary.*

(Printed Record, 53–58, [94–104].)

The brief for defendants in the circuit court says (p. 51):

> The lands in controversy were selected and certified under the direction of the Secretary of the Inte-

> rior, and with his approval, on the 10th day of April, 1873, AS INDEMNITY LANDS UNDER THE ACT OF 1863.
>
> They had been previously selected BY THE COMPANY on the 8th of August, 1872, as indemnity under the SAME ACT, but the selection *authorized by the act of Congress* was the one *made by the certificate of April* [10], 1873, above named.

IF this latter list be treated as a selection by the Secretary *in favor of the M., K. and T. Co.*, it is *distinctly made under the act of March* 3, 1863. The whole record shows that a selection under the act of 1866 was not only not made, but denied. This is *shown in the letter of the Secretary* of the Interior of March 25, 1867. (Printed Record, 66 [122].)

On this record it follows that the M., K. and T. Co. acquired no legal *or equitable* right to these lands as indemnity under the act of 1866. This is so because—

1. ***The statute requires a selection by the Secretary under this act to give even any equitable indemnity rights*** UNDER IT, ***and none was made.***

This is now settled beyond controversy by *Kansas Pacific R'y Co.* v. *Atchison, Topeka and Santa Fé Co.*, 112 U. S., 414, 421, in which Miller, J., says:

> The question, therefore, for determination is, whether the *grant* to Kansas, by act of Congress of March 3, 1863, covered the title to *these indemnity* lands. We are clear that it did not. It *granted* only alternate sections designated by odd numbers, within the limit of ten miles, and from them certain portions were to be excepted. For what was thus excepted other lands *were to be selected* from adjacent

lands, if any then remained to which no other valid claims had originated. But *what unappropriated* lands would thus *be found*, and *selected*, could not be known before *actual selection*. A *right to select* them, within certain limits, in case of deficiency within the ten-mile limit, was alone conferred, *not a right to* ANY SPECIFIC LAND or *lands capable of identification* by any principles of law or any rules of measurement. Neither *locality nor quantity* is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, *the right of selection became a barren right, for until selection was made the title remained with the Government, subject to its disposal at its pleasure.*

The grant to the Kansas Pacific Company by the act of 1862 carried the odd sections within the limit of ten miles from its road, and by the act of 1864 such sections within the limit of twenty miles. The act of 1862 is to be construed, as already said, as though the larger number were originally inserted in it, and, with the exceptions stated, it must be held to pass the title to the grantee as against the United States, and against all persons not having acquired that title previous to the amendments. The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from defendant's road, upon certain contingencies. It gave NO TITLE *to indemnity lands in advance of their selection.*

That is, it gave neither legal nor equitable title. Identification by *selection* is as essential to fix an equity as it is to fix a legal right.

2. It has been forcibly shown, by the opinion of the cir-

cuit court in this case, that the M., K. and T. Co. cannot establish an *equitable* claim to *these identical lands*—

> By proof [which is not made] that it had an unadjusted equitable claim upon the Government for an equal quantity of unselected lands.*

And there is abundant reason for this. The act of 1863 would necessarily give *greater, because earlier*, land-*grant* rights than the act of 1866. The Secretary of the Interior, in his letter of March 25, 1867 (Printed Record, 65 [120]), says:

> The grant of the State of Kansas by the said acts of 1863 and 1864 is the alternate odd-numbered sections for TEN sections in width on each side of the roads and branches, with the right of indemnity for lands disposed of from ODD *sections* outside of ten and within twenty miles of the same. * * *
>
> The grant to Kansas by said act of July 26, 1866, is for alternate odd-numbered sections to the extent of FIVE alternate sections per mile on each side of said road, not exceeding in all ten sections per mile, with right of indemnity outside of ten and within twenty miles from BOTH the *odd* AND *even* sections.

3. And the fact that the M., K. and T. Co., *by claiming*, or the Secretary of the Interior by selecting, *under the act of* 1863 rather than 1866, *could defeat the claims of settlers under the homestead and pre-emption acts* attaching between the dates of these acts, and thus obtain lands under the act of 1863 which it could not secure under the act of 1866, may furnish *a reason* for the claim under the former act and for the action of the Land Department.

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* *Ante*, p. 36.

Having thus *already obtained the benefit* of the *earlier grant*, of *granted lands* under the act of 1863, *along the line* of *road from Emporia to Chanute*, a line "*long drawn out*" as we may well suppose, for the very purpose of getting the greater quantity of *granted* lands under the act of 1863—having thus ousted many settlers of rights which would have attached if the company had claimed under the act of 1866, it then turns round and *claims* that along the *same portion of road* it is entitled to *indemnity* lands ALSO, under the act of 1866, *in both odd and even sections*, whereas under the act of 1863 it could claim indemnity only in *odd* sections. And this "shifting inheritance" is set up as the basis of an equity!

Before the company can *repudiate* the act of 1863 for *indemnity* rights and *claim under the act of* 1866 or under *both* acts, it must, *in equity*, surrender its *land-grant* rights under the act of 1863 and take only land-grant rights under the act of 1866. It must first surrender the lands *within the ten-mile limits* to which homestead and pre-emption rights of settlers attached between March 3, 1863, and July 26, 1866. "He who asks equity must do equity." It is to be noted that *granted* lands secured under the act of 1863 within 10 miles of the road are more valuable than *indemnity* lands at a greater distance from the road.

4. *There is another reason why the M., K. and T. Co. can acquire no equitable title to these lands within indemnity limits, or at least cannot invoke the aid of a court of equity now.* The letter of the Commissioner of the General Land Office of March 19, 1867 (Respondent's Proofs, 51), *unlaw-*

fully withdrew from future homestead and pre-emption entry—

> *All* the odd-numbered sections, within the *ten*-mile limits and *all* the vacant lands between the *ten* and *twenty* mile limits—

of the M., K. and T. road, *including the lands now in controversy*. The *illegality* of this withdrawal has been shown by authorities already cited. (*St. P. R. R. Co.* v. *Winona R. R. Co.*, 112 U. S., 731.) It is fair to presume—current history, judicially noticed proves—that if this land grant had been lawfully administered *every acre* of these lands would have been taken by settlers before the alleged selection for indemnity, *April* 10, 1873 (Printed Record, 58 [104]).

Settlers were unlawfully denied their rights under the acts of Congress. And now *this court* is asked to *sanctify* this *grave mistake*, not to say enormity or outrage on their rights, and to aid the M., K. and T. Co. in obtaining lands which by every principle of justice and law should have been left open to be taken, and if so, would have been taken, by settlers. It may not be *proved* that every acre of these lands is now covered over with homestead and pre-emption entries, which will become available if the United States obtains a decree establishing its title in this case. But if not so proved, a court of equity will not aid the M., K. and T. Co. in holding lands to which settlers would have obtained titles under a lawful administration of the homestead and pre-emption laws.*

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* The record (Print 68, 71, [126]–[131]) shows lists of lands patented to, or certified in favor of, the M., K. & T. Co.

The act of Congress of July 1, 1864 (Respondent's Proofs, 26),

5. It is impossible now for the court to say that the company has any equitable rights to *these* indemnity lands, or that the Secretary would have in any event selected them under the act of 1866.

He did decide, as may be inferred, that the M., K. and T. Co., by claiming *granted* and *indemnity* lands, *along this portion of the road*, as and for the Emporia branch waived *its rights*, under the act of 1866, and having received lands granted as under the act of 1863, it is estopped from claiming under the latter act.

The evidence on behalf of settlers and otherwise which may affect a claim by the M., K. & T. Co., under the act of 1866, is not all before the court. The Secretary in selecting indemnity *under the act of* 1863, gave such

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does not make *any* land grant or give any indemnity rights SOUTH of EMPORIA. Yet an examination of the lists of lands above referred to, in the record, shows that lands were given to the M. K. & T. Co. SOUTH OF EMPORIA, under THE ACT OF JULY 1, 1864, as follows:

"Lands *south* of Emporia within the ten-mile limits of the grant:

June 19, 1872, per list 6	7,767.41
May 31, 1873, per list 8½	13,603.55
	21,370.96 acres.

Lands *south* of Emporia in the twenty-mile (indemnity) limits of the grant:

June 19, 1872, per list No. 7	6,818.97
May 31, 1873, per list No. 8½	34,593.72
	41,417.69 acres."

This will serve to show the utter misconstruction of this land-grant act, with the *error in favor of the railroad company*, and *against settlers*, whose rights were cut off with the date of the act of July 1, 1864, instead of the date of the act of July 26, 1866.

rights as he *judged that act*, with *that date* and on the facts material under that act, gave.

It does not follow that the act of 1866, with its *later date*, would give *equally extensive* or any indemnity rights in *odd sections* on this portion of the road. The Secretary decided on proper facts that it gave *none*.

6. In fact *wherever the M., K. and T. road* CROSSES or RUNS THROUGH *the land grant and indemnity limits* of a PREVIOUS *land grant act, said company can claim no indemnity lands at all.*

That is, inasmuch as the act of 1863 gave the L., L. and G. Road a right to *earn the identical lands now in question as indemnity lands*, the act of 1866 *cannot give any indemnity rights* in the same lands. This is the rule of administration—as it is understood—adopted in the Interior Department by a decision of the Secretary of the Interior, made June 16, 1886 (Copp's Land Owner, July 15, 1886, vol. xiii, No. 8,* p. 92), as to the lands—as these are—within the *indemnity* limits of the L., L. and G. road, and as against the M., K. and T. Co. And see *Rogers* v. *Atlantic and Pacific R. R. Co.*, Copp's Land Owner, Sept. 15, 1886, vol. xiii, No. 12, p. 135.

It may be that the case of *K. P. Co.* v. *A., T. and S. F. Co.*, 112 U. S., 421, decides that where two land-grant road scross each other, each having *indemnity* lands *only in odd sections*, the later grant with an *earlier* selection will secure *priority* in *such* selected indemnity lands. But when, as in *this case*, the *later* act of 1866 gives indemnity rights in *both* ODD AND EVEN *sections*, such right does not

*The brief of the writer in that matter is on file in the Interior Department.

exist in *either* odd or even sections, *within the indemnity limits of the L., L. and G. road.* This would destroy the policy of *alternation*—the policy of *reserving* alternate sections to the United States—a policy preserved in *all* the land-grant acts.

This subject was fully discussed in the case above mentioned, and decided by the Secretary of the Interior.

Additional reasons and authorities on this subject have already been presented, and to them reference is especially made in this connection.*

Van Wyck v. *Knevals*, 106 U. S., 360, decides nothing as to indemnity lands. It relates to the failure of the Secretary of the Interior to withdraw from market lands granted in place, which cannot defeat the right of a company, because lands in place pass by grant *in præsenti*, operative when the line of a road is definitely located, while no right at law or in equity can attach to indemnity lands until *selection*.

In *St. Paul, &c., R'd Co.* v. *Winona, &c., R'l'd Co.* (112 U. S., 731), the Secretary of the Interior, under a mistake of law, certified lands to one company to which the other was entitled, and the court said, "this erroneous decision of his cannot deprive the Winona Company of its rights, which became VESTED BY ITS SELECTION OF THESE LANDS."

III. ***The list approved April 10, 1873, by the Secretary of the Interior is not a selection of indemnity lands in favor of the M., K. and T. Co.; it is not a selection of indemnity lands at all.***

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* *Ante*, p. 50.

1. It is true it is called "MISSOURI, KANSAS AND TEXAS RAILROAD LIST." (Printed Record, 53, [95].) It is on its face only a list of lands within indemnity limits—

> Which the United States had not sold or to which the right of pre-emption or homestead had not attached.

It is a list of lands from which indemnity lands might be selected. But there is no *finding* that the M., K. and T. Co. is entitled to any of said lands, or that any of them are selected as or for indemnity lands.

A list of lands from which selections are apparently authorized is not a selection at all.

2. The *court* cannot make a *selection* of lands, even if the Secretary of the Interior ought to have done so under the act of 1866, but did not. This has been already shown.*

3. It has been sufficiently shown that the court cannot refer a *selection* made under the authority of the act of 1863 to a *power* under the act of 1866.†

The conclusion follows that the M., K. and T. Co. never acquired any legal or equitable title to the lands in controversy.

IV. ***The M., K. and T. Co. has received all the granted and indemnity lands to which it is entitled under the act of 1866.***

1. It is to be *presumed* that the Land Department has performed every duty which the act of 1866 requires of it, including the selection of indemnity lands. This presumption rests on a principle well settled.

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* *Ante*, p. 36. † *Ante*, p. 35.

2. *But in any event the onus is on the defendant not only to show that the M., K. and T. Co. is, under the act of* 1866, *entitled to* MORE *indemnity lands, but also to* THESE LANDS *as indemnity.*

These lands were not selected by the Secretary of the Interior under the act of 1866. His refusal to sanction a selection by the company, under the act of 1866, is evidence either that the company had received all the lands it could claim under that act or that it could not claim these lands under said act. If he had made a selection under the act of 1866 a presumption might arise *prima facie* that the company was entitled to these lands. But as he did not, the presumption is the other way, and the *onus* is on defendant to rebut it. (*A. T. and S. F. Co.* v. *Rockwood,* 25 Kansas, 298; *Ryan* v. *Railroad Co.,* 99 U. S., 382.)

The company has furnished no sufficient evidence that it is entitled either to *more* indemnity lands or to THESE LANDS under said act.

The record shows how much *granted* and *indemnity* lands have been patented by certain named patents to the M., K. and T. Co and how much lands were certified to the State of Kansas for it. (Printed Record, 68–71 [129]–[132]; Respondent's Proofs, 79–83.)

It is shown also that the Supreme Court has determined that the M., K. and T. Co. is not entitled to any granted or indemnity lands south of the north boundary of the Osage ceded lands. (*Id., M., K. and T. Co.* v. *U. S.,* 92 U. S., 760.)

But it is a grave error to *assume* that the M., K. and

T. Co. is "entitled to ten sections per mile for the distance from Junction City to the northern boundary of the Osage Indian Reservation near Chanute, or, say, for 128 miles." (Brief for defendant in circuit court, p. 70.) The company cannot claim *that amount* of lands, if it could not be found within granted or indemnity limits, *unappropriated by homestead or pre-emption entries of settlers*, prior to actual selection as indemnity in favor of the company. The company cannot in equity ask the court to award *these* lands to it, if by a legal administration of the land-grant acts they would all have been taken by homestead and pre-emption entries.

What *portions* of the lands through which the M., K. and T. road passes is *covered by reservations*, like the Osage ceded lands, and how much granted and indemnity lands the company *has lost* because its road *deflected* from *its line of definite location* and *otherwise*, in which no grant or right to indemnity ever attached, does not appear, and the court cannot know. When the company *asserts* an *equitable* right to *these* lands under the act of 1866 the *onus* is on it to show that it is entitled to more lands, and this is not shown.

The conclusion follows that is not shown that the M., K. and T. Co. has any right even *to ask for any selection of* indemnity lands.

SIXTH PROPOSITION.

IT IS SUBMITTED THAT THE LANDS IN CONTROVERSY ARE NOT SUBJECT TO ANY LAND GRANT, BECAUSE INCLUDED IN THE NEW YORK INDIAN RESERVATION UNDER THE TREATY OF JANUARY 15, 1838, NEVER LEGALLY REVOKED.

On this subject reference is made to the following:

I. Senate Miscellaneous Document No. 38, 2d session, 47th Congress, January 22, 1883.

II. President's proclamation of August 21, 1860, for the public sale, on December 3, 1860, of lands, "not covered by individual Indians locations" in the New York Indian Reserve.

III. Letter of the Commissioner of Indian Affairs to William Lawrence on this subject, March 11, 1886.

IV. Letter of the Commissioner of the General Land Office to same, on same subject, April 7, 1886.

L., L. and G. Co. v. *United States*, 92 U. S., 746. It must be conceded that since the President's proclamation referred to, the lands have been treated as public lands, but this cannot change their status as fixed by the treaty. It is deemed proper, *ex abundanti cautela*, to submit this for the consideration of the court, though the prior propositions seem to render this unnecessary.

Finally, the claim of the M., K. and T. Co. has been judicially declared without merit by the highest court of the State of Kansas, after exhaustive argument. (*Neer* v. *Williams*, 27 Kansas R., 1.) This is entitled to respectful consideration.

CONCLUSION.

It only remains to say that the great length of this argument finds some excuse, if not justification, in the magnitude of the interests involved and the number of legal questions requiring consideration. Some repetition has occurred in order to present under each PROPOSITION discussed, the questions of law and fact, which seemed in some degree connected therewith.

Respectfully submitted.

WILLIAM LAWRENCE,
Of Counsel for U. S.

OCTOBER 2, 1886.

118-682

OCT 11 1886
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY appellants,

vs.

BENJAMIN HARRIS BREWSTER, Attorney-General of the United States, for and on behalf of the United States of America, appellee.

No. 749.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY appellants,

vs.

BENJAMIM HARRIS BREWSTER, Attorney-General of the United States, for and on behalf of the United States of America, appellee.

No. 749.

BRIEF FOR APPELLEE.

The appellant is the successor of the Leavenworth, Lawrence and Fort Scott Railroad, which was designated by the State of Kansas to build the first line of road projected and subsidized by the act of Congress of March 3, 1863.

The Missouri, Kansas and Texas Railroad Company is the successor of the Union Pacific, Southern Branch, to which the act of July, 1866, made a direct grant.

The lands in controversy are more than ten and less than twenty miles from the line of road constructed by each of said companies.

The act of July 1, 1864, projects and subsidizes a rail-

road that begins and ends a long ways to the north of the lands in controversy, and it is only necessary to consider this act in this case for the purpose of ascertaining the true intent and meaning of the acts of 1863 and 1866.

As will have been observed, the land in controversy was jointly selected by the Missouri, Kansas and Texas Railroad Company and the appellant, and claimed under the acts both of 1863 and 1866.

We shall attempt to demonstrate that neither of these companies were entitled to this land under either of the acts, and, therefore, that the certification thereof to the State of Kansas was properly canceled and annulled by the court below. (Rev. Stat. U. S., 1878, § 2449, *U. S.* v. *Stone*, 2 Wallace, 525.)

All claim to the land on account of the grant to appellant has been abandoned. Appellant never constructed the entire line of road, as required by the act of 1863, and the forfeiture of its right to any indemnity land has been duly declared. (Stat. L., vol. 19, p. 101; Rec., p. 34.)

The defense rests upon the claim of the Missouri, Kansas and Texas Railroad Company:

First. Under the grant made by the act of 1863.

Second. Under the grant made by the act of 1866.

We will discuss these claims in the order in which we have stated them.

I.

CLAIM UNDER THE ACT OF 1863.

The act of 1863 granted land to aid in the construction of a branch railroad that should commence at the point where the main line of the Atchison, Topeka and Santa

Fé Railroad crossed the Neosho River, and extend thence southward down the valley of said river to where the line of the Leavenworth, Lawrence and Fort Scott Railroad enters the same.

The State of Kansas, in accepting this grant by the act of 1864, suggested that Congress should make a grant of lands for the extension of this branch northward so as to interesect the Union Pacific Railroad at or near Fort Riley, and provided that if said suggestion was adopted by Congress, the Atchison, Topeka and Santa Fé Railroad Company should proceed to construct the same.

> The act thus suggested Congress did not pass, but on the 1st of July, 1864, it did pass an act making an additional grant of land for the constructing of a railroad and telegraph line from Emporia via Council Grove, to a point at or near Fort Riley, on the Union Pacific Railroad. (*Mo. &c., R'y Co.* vs. *Kans. Pac. R'y Co.*, 97 U. S., 491, 499.)

The act of Congress differed from the acts suggested by the Kansas legislature in this only, that the grant was for an independent line, and not for the continuation northward of the branch to be built by the Atchison, Topeka and Santa Fé Railroad Company, under the act of Congress of March 3, 1863, and the act of Kansas of February, 1864.

A glance at the map of Kansas shows that Emporia is situated at or near the point where the Atchison, Topeka and Santa Fé Railroad crosses the Neosho River, and that Council Grove is situated on the Neosho River. Thus it appears that Congress, by the acts of 1863 and 1864, subsidized a line of road to extend from Fort Riley, in the

north, down the valley of the Neosho River nearly to the southern line of Kansas, though by the terms of the grant of 1864 so much of that line as was north of Emporia was to be an independent railroad, and so much of it as was south of Emporia a branch of the Atchison, Topeka and Santa Fé.

The grant along the whole line was uniform, for the act of 1864, so far as the grant per mile was concerned, expressly adopted all the provisions of the act of 1863, which it did not literally repeat. There was granted every alternate section of land designated by odd numbers, for ten sections in width, on each side of the road, which at the date of the grant was not reserved or appropriated for any other purpose. The grant was *in praesenti*, and attached to specific land so soon as the route of the road was definitely located. Until there should be such definite location Congress reserved the right to dispose of the granted lands for certain indicated purposes, and both acts provided that for lands thus disposed of between the date of the grant and the date of definite location, the railroad company should be indemnified by an equal amount of land, to be selected by the Secretary of the Interior from odd-numbered sections, more than ten and less than twenty miles from the railroad, if any such land there was in the public domain unappropriated at the date of selection. (*Leavenworth, L. and G. R. R.*, vs. *U. S.*, 92 U. S., 733, 748; *Newhall* vs. *Sanger*, 92 U. S., 761, 763.)

Although the State of Kansas had accepted the grant of 1863, and in accepting that grant had asked for the grant made by the act of 1864, and had designated the

Atchison, Topeka and Santa Fé Railroad as the agent that should construct the whole line in the Neosho Valley, it took no action to meet the provision in the act of Congress of 1864 that the line north of Emporia should be an independent line, and on the 19th day of March, 1866, the Atchison, Topeka and Santa Fé Railroad Company executed a deed of assignment to the Missouri, Kansas and Texas Railway Company (Union Pacific, Southern Branch) of all its rights under the acts of Congress of 1863 and 1864, and the act of the Kansas legislature of 1864, to construct and operate a railroad in the Neosho Valley. That this assignment was void and conferred no rights upon the Missouri, Kansas and Texas Railroad Company under the acts aforesaid will not be seriously denied.

But this assignment did amount to a notice by the Atchison, Topeka and Santa Fé Railroad Company that it did not propose to construct the said road down the Neosho Valley.

In this state of affairs Congress passed the act of July 26, 1866. That act granted to the State of Kansas, for the use of the Missouri, Kansas and Texas (then U. P. Southern Branch) Railroad Company, and for the purpose of aiding that company to construct and operate a railroad from at or near Fort Riley, Kansas, "thence down the valley of the Neosho River to the southern line of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas. * * * Every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said

road, and not exceeding in all ten sections per mile," which at the date of the grant was not reserved or appropriated for any purpose whatever. This act, like the acts of 1863 and 1864, reserved to the Government the right to dispose of the lands granted until the road was definitely located, and contained a provision for indemnity on account of lands thus disposed of similar to the provisions in those acts, except that even as well as odd sections might be selected by the Secretary of the Interior for the purpose of indemnity. (*Mo., &c., Ry. Co.* v. *Kans. Pac. Ry. Co.*, 97 U. S., 491–500.)

The road projected by this act of 1866 was practically identical in location with the line or lines of road down the Neosho Valley, projected by the acts of 1863 and 1864.

The first question presented is, Did Congress by the act of 1866 intend to aid in constructing a second and distinct line of road down the Neosho Valley, or was the grant in that act to aid in constructing the same line or lines projected by the acts of 1863 and 1864?

If the grant was intended to aid in constructing a second and distinct line of road, it is clear that the Missouri, Kansas and Texas Railroad Company could not earn the grants of 1863 and 1864 by constructing only such second and distinct line, and that it cannot maintain any claim to the land in controversy under the act of 1863.

On the other hand, if the grant in the act of 1866 was intended to aid in constructing the same line as that projected by the acts of 1863 and 1864, we insist that such acts, in so far as they granted lands to aid in the construction of said Neosho Valley line, were repealed thereby.

In considering these acts this court, we think, reached

the same conclusion. The Missouri, Kansas and Texas Railway Company claimed certain lands that lay within the limits of the grants of 1864 and 1866, as the lands now in controversy lie within the limits of the grants of 1863 and 1866.

In speaking of the title of the M., K. and T. to the lands under the acts of 1864 and 1866, this court says:

> This act of 1864 was never accepted by the State of Kansas. No route of a road between the points designated in it was ever located by the company, nor was any map of a proposed route ever filed in the Department of the Interior. Nothing, indeed, was done by the State or company under the act until after the grant it offered had been superseded by the acceptance of the greater and more valuable grant made by the subsequent act of July 26, 1866, which covered the same lands. (*Mo., &c., R'y Co.* v. *Kans. Pac. R'y Co.*, 7 Otto, 499.)

While the act of 1863 had been formally accepted by the State of Kansas, the agent designated by it to build the Neosho Valley Branch had, as we have seen, resigned its rights prior to July, 1866, and in other respects all that the court here says about the grant of 1864 is equally applicable to the grant of 1863 for the Neosho Valley branch.

If Congress had power to repeal the grant of 1864, as the court here says it not only had, but exercised, by the act of 1866, Congress also had the power, and did by the same act, repeal the act of 1863.

Kansas took no beneficial interest under the grant of 1863. The Atchison, Topeka and Santa Fé had repudiated its vested right under the Kansas act of 1864,

and has never from that day to this, either attempted to earn the grant or set up any claim to it. The act of the Kansas legislature under which the Missouri, Kansas and Texas claims was not passed until long after the passage of the repealing act, and vested no right in it. (*Rice* vs. *Railroad Company*, 1 Black, 258.) But whatever might have been the rights of the Missouri, Kansas and Texas under the act of 1863, the formal acceptance by it of the grant made by the act of 1866, with all its conditions and provisions, removes any doubt as to the efficacy of the act of 1866 to repeal the grant of 1863.

A grant is a contract (Cooley's Con. Lim., 331, 332; *Fletcher* v. *Peck*, 6 Cranch, 638), and will be discharged or annulled by a new contract or grant inconsistent with its terms. (Anson on Contracts, 250 and 251; Addison on Contracts, vol. 2, 839, bottom paging.)

That Congress intended to supersede and repeal the grants of 1863 and 1864, by the act of 1866, and that the acceptance of that act by M., K. and T. effectuated that purpose, is very clear. The lands granted in that act are identical with the lands granted by the act of 1863, within the geographical limits of that grant.

They could not pass to the State of Kansas under the provisions of the act of 1863, and also pass under the act of 1866 by direct certification to the Missouri, Kansas and Texas for its own use and benefit. But they would pass to the State of Kansas despite the provisions of the act of 1866, unless that act repeals the act of 1863. The title to land under a railroad grant vests from date of grant and not from date of definite location of route. (*M., K. and T.* vs. *Kan. Pac. Ry. Co.* 97 U. S., 491–498; *St.*

Paul and Sioux R. R. Co. vs. *Winona R. R. Co.*, 112 U. S., 720.)

When the line of road was located, therefore, the title to every section of land within either grant passed under the act of 1863. The title under which it passed, being older than the grant of 1866, no right of indemnity vested under that act. Pursuing this line of thought, it is evident that both acts cannot be operative; either covers the whole ground. In this state of the case all the authorities agree that the latter act repeals the former. (Sedgwick on Statutes, page 124; *King* vs. *Cornell*, 106 U. S., 395; *Daviess* vs. *Fairbairn*, 3 How., 636.)

Therefore we conclude that the Missouri, Kansas and Texas has acquired no right to the land in controversy under the act of 1863. To repeat: If the grant of 1866 was to aid in building a different line from that to which the grant of 1863 was made, then the proof shows that the line to which the grant of 1863 was made has not been built. If the two grants were made to aid in building the *same* line, then the grant of 1863 was repealed by the act of 1866.

(2) Had the act of 1863, like the act of 1866, designated the Union Pacific Southern Branch as the beneficiary of the grant for the Neosho Valley Branch, our position would be none the less tenable. But the Missouri, Kansas and Texas could not become entitled, under any circumstances, to the grant made by the act of 1863. That act contains the following provision:

> *Provided also*, That no part of the land granted by this act shall be applied to aid in the construction of

any railroad or part thereof for the construction of which any previous grant of land or bonds may have been made by Congress.

By the express terms of the act of 1863 Kansas was to *apply* the lands granted to the building of the roads indicated. The application was necessarily after the grant, and the inhibition includes every railroad that had received any aid for constructing any part of its line previous to the application aforesaid, whether before or after date of grant. The action by Kansas upon which appellant relies to establish its rights under act of 1863, was the joint resolution of the Kansas legislature of 1867. Now this resolution was directly in the face of the proviso quoted above, because six months previous to this attempted application the act of 1866 making a direct grant of lands to the Union Pacific Southern Branch had been passed.

(3) Again, if the M., K. and T. had not received any previous or subsequent grant of lands, and the road that the proof shows was constructed had been constructed alone to earn the grant of 1863, the grant would not have been earned for two reasons:

First. The road built by the M., K. and T. was not a branch of the main line constructed by the Atchison, Topeka and Santa Fé, but an independent line. The grant was to a branch of the main line built by the Atchison, Topeka and Santa Fé, and we submit that it is impossible to read the act of 1863 without being convinced that Congress knew the difference between a branch and an independent line, and that Congress intended to aid a branch in contradistinction to an independent line.

Second. The line of the Missouri, Kansas and Texas was not located in accordance with the requirements of the act of 1863. The act required that the Neosho branch should run to the point at which the Leavenworth, Lawrence and Fort Scott Railroad enters the valley of the Neosho. The map of definite location of the Missouri, Kansas and Texas shows that instead of intersecting the Leavenworth, Lawrence and Fort Scott at that point, the intersection takes place 10 or 12 miles south of the point at which that road crosses the river itself.

How the Leavenworth, Lawrence and Fort Scott, which enters the valley of the Neosho from the north, could cross the river itself and run 12 miles south before entering its valley, is a mystery to us.

(4) But if all the positions for which we have contended are unsound, still we insist that the Missouri, Kansas and Texas has no claim to the land in controversy under the act of 1863. As we have seen, that act provides for the building—

> First, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Railroad where said road intersects the Neosho River.
>
> Second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, N. Mex., with a branch from where this last-named road crosses the Neosho, down said Neosho Valley to the point where the said first-named road enters the said Neosho Valley.

Now, it is agreed that the Leavenworth, Lawrence and Galveston Railroad Company (appellant) never constructed the line from Leavenworth to Lawrence and never constructed the branch via the Wakarusa River. (See rec., page 23.)

The act of 1863, section 4, provides as follows:

> And when the governor of said State shall so cercertify, and the Secretary of the Interior shall be satisfied, that the whole of said roads and branches and telegraph are completed in a good substantial and workmanlike manner, as first-class railroads and telegraphs, the said State may cause to be sold all the remaining lands granted and selected for the purposes indicated in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches: *Provided*, That if any part of said roads and branches is not completed within ten years from the passage of this act, no further sale shall be made and the lands unsold shall revert to the United States.

Now, in view of this provision, and of the fact that neither the governor of Kansas nor the Secretary of the Interior ever certified or were satisfied that the *whole of said roads and branches* were completed and that they never were completed, how is it that any claim to the land in controversy, as indemnity, can be maintained by the Missouri, Kansas and Texas? The *condition precedent* to certification to and disposition by the state of indemnity lands has never been performed.

5. The decisions of the Commissioner of the General Land Office, as to where the Missouri, Kansas and Texas should intersect the line of the Leavenworth, Lawrence and Fort Scott, and as to the rights of the Missouri,

Kansas and Texas generally, under the grants of 1863, 1864, and 1866 are, we submit, not binding upon appellee in this case.

The decisions relied on were all *ex parte*, and were the result of an erroneous construction of the law applicable to the facts. This court has never held, either directly or by implication, that such decisions were conclusive against the United States in a direct proceeding to cancel and annul patents or certifications to lands that were granted without warrant of law. (*Moore* vs. *Robbins*, 96 U. S., 530; *Shepley* vs. *Cowan*, 91 U. S., 330; *United States* vs. *Minor*, 114 U. S., 233; *M., K. and T.* vs. *U. S.*, 92 U. S., 760.)

Section 2449, Revised Statutes, 1878, which authorizes the certification of granted lands, provides that the certification shall convey the fee simple of all the lands embraced in such lists that are of the character contemplated in the act of Congress *and intended to be granted thereby* and none other. * * *

So far as the point of junction prescribed by act of 1863 for the Neosho Valley Branch and the L., L. and F. S. R'y Co. is concerned, the decision of the Commissioner is directly *against* point of junction as located.

If the doctrine contended for by appellants be correct, the whole public domain is at the mercy of the officials of the Land Office.

II.

The claim of the Missouri, Kansas and Texas, under act of 1866.

The claim of equitable title, under the act of 1866, is an affirmative defense, and the burden of proving all the

facts necessary to its establishment rests upon the appellant.

Granting, for the sake of the argument, that an equitable title, under the act of 1866, would be a good defense to our suit, which seeks to cancel and annul the legal title wrongfully secured under the act of 1863, we insist that the proof does not establish that equitable title.

To maintain it, appellant relies:

First. Upon the proof that the M., K. and T. has constructed its road in accordance with the provisions, and earned the grant made by the act of 1866.

Second. The land in controversy lies within the indemnity limit of that grant.

Third. That the lands in controversy were duly selected as indemnity under the act of 1866 as well as under the act of 1863.

Fourth. That the Secretary of the Interior approved the selection under the act of 1863 alone, when, if that act was repealed, he should have approved it under the act of 1866.

Fifth. Upon the legal proposition that the M., K. and T., being without fault, should not be prejudiced by the errors, mistakes, or derelictions of the Secretary of the Interior. We insist that the approval by the Secretary of this selection, under the act of 1863, is not evidence that such selections were earned or should have been approved under the act of 1866.

(1) The provisions for indemnity under the two acts are different. The provision in the act of 1863 confines the indemnity to odd-numbered sections nearest the tiers of sections granted; that of 1866 to the sections nearest those granted, whether odd or even.

There is no proof even tending to show that there are not even-numbered sections nearer the granted land than the odd-numbered sections in controversy.

(2) The indemnity that would have been due under the act of 1863 was necessarily much greater in amount than that due under the act of 1866. For all land reserved for internal improvement from the date of the passage of the act of 1863 up to the date of the definite location of the road, to wit, December, 1866, indemnity would be due under the act of 1863, while under the act of 1866 indemnity could only be claimed on account of such reservations from the date of the passage of that act to December, 1866. Thus the amount of indemnity under the act of 1866 was, in all probability, much less than that due under the act of 1863.

In addition to these considerations, which demonstrate the insufficiency of the proof upon which appellant's claim of equitable title rests, we insist that there is proof in the record which overwhelmingly demonstrates that the Missouri, Kansas and Texas has, outside of and in addition to, the lands in controversy, received a very much larger amount of land than it ever could have earned.

The total length of the Missouri, Kansas and Texas Railroad through the public domain in Kansas, as shown by its map of definite location and claimed by counsel for appellant, is 128 miles. It is also shown by the maps in proof that the line of the Missouri, Kansas and Texas runs from a junction with the Union Pacific, Eastern Branch (now Kansas Pacific), and intersects in this 128 miles the line of the Atchison, Topeka and Santa Fé.

The Kansas Pacific, by the acts of 1862 and 1864, has

a grant of all the alternate odd-numbered sections for 20 miles on each side of its line.

The Atchison, Topeka and Santa Fé, by the act of 1863, has a grant of all the odd-numbered sections for 10 miles on each side of its line.

As these grants are older than the grant of 1866, the M., K. and T. did not receive any grant of lands in place, nor acquire any right of indemnity for failure to receive the same on 40 miles of this 128 miles of its length.

Now, if along the balance of its route, say, 88 miles, it could take the extreme limit of its grant, to wit, ten sections per mile (and this is most improbable, since this grant overlapped others of elder date), the total amount to which it could be entitled would be 563,200 acres of land.

Now, the proof shows that the M., K. and T. has received on account of this grant, and exclusive of the lands in controversy, 690,000 acres of land.

We assume, as a legal proposition beyond controversy, that the Missouri, Kansas and Texas is not entitled under the act of 1866 to any indemnity on account of lands theretofore reserved for the purpose of aiding in the construction of internal improvements. This is shown by the proviso to the first section of that act, and was expressly decided by this court in the case of *M., K. and T. Ry. Co.* v. *U. S.*, 97 Otto, 760.

See record, pages 69 and 71, showing that title to indemnity lands in the Osage lands were canceled by the decree in that case.

See also *Barney* v. *Winona and St. Peter R. R. Co.*, 113 U. S., page 618. Same case, 117 U. S., page 228; *Leavenworth, &c., R. R. Co.* v. *United States, supra; New-*

hall v. *Sawyer, supra;* Opinions of the Attorney-General, vol. 16, page 503; *United States* v. *Burlington, &c., Ry. Co.,* 98 U. S., 334–339. The distinction between the right of indemnity for lands sold, pre-empted, or taken up by homestead settlement, and lands reserved to aid an internal improvement, or for other purposes, by Congress, has been so thoroughly and fully illustrated by the decisions of this court that we need not here do more than make this passing allusion to it.

In this state of affairs the threat of appellant's counsel to reselect this land under the grant of 1866, and have it certified again to the M., K. and T., should the Government be successful in this suit, fails to dissipate our interest in its result. We believe that the proof demonstrates that the M., K. and T. has received more land than it could possibly have earned under either or all the grants of 1863, 1864, and 1866 combined.

Respectfully,

A. H. Garland
Atty Genl.

ED. M. WATSON,
Assistant Attorney.

118-682

OCT 11 1886
JAMES H. MCKENNEY,
CLERK

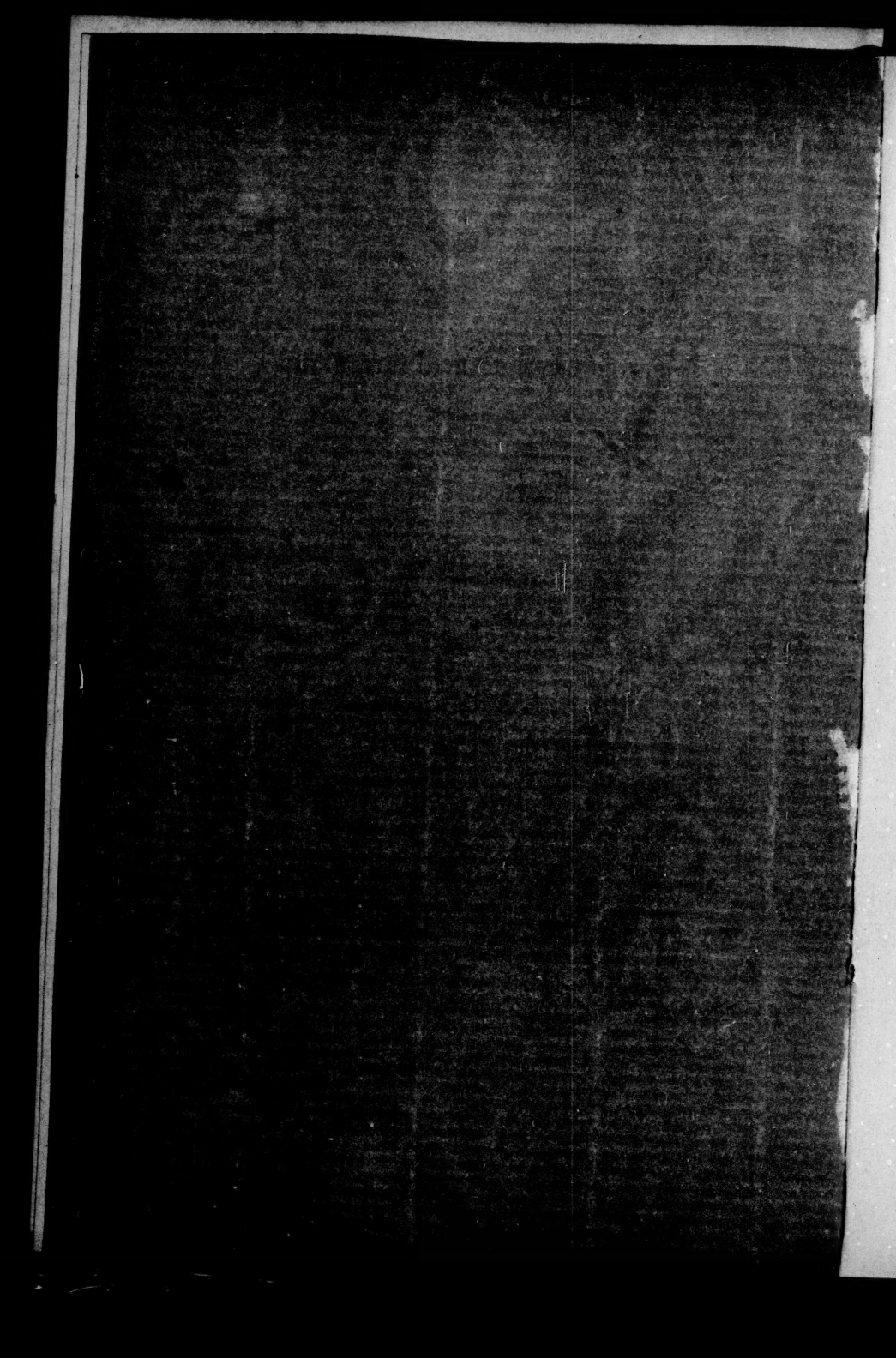
In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE and Southern Kansas Railroad Company, appellant,
vs.
BENJAMIN HARRIS BREWSTER, Attorney-General, &c., for and on behalf of the United States, appellee.

No. 749.

STATEMENT OF THE FACTS IN THE RECORD, INCLUDING COPIES OF MATERIAL STATUTES AND OPINION OF THE COURT BELOW, BY COUNSEL FOR APPELLEE.



In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE and Southern Kansas Railroad Company, appellant,
vs.
BENJAMIN HARRIS BREWSTER, Attorney-General, &c., for and on behalf of the United States, appellee.

No. 749.

STATEMENT OF THE FACTS IN THE RECORD, INCLUDING COPIES OF MATERIAL STATUTES AND OPINION OF THE COURT BELOW, BY COUNSEL FOR APPELLEE.

The Attorney-General, for and on behalf of the United States, brought this suit against the Kansas City, Lawrence and Southern Kansas Railway Company, for the purpose of canceling a certification by the Commissioner of the General Land Office of certain odd-numbered sections of land in Allen County, Kansas, to the State of Kansas, the patent of said State for the same to the Missouri, Kansas and Texas Railway Company, and the conveyances by said company under which the respondent claims, as clouds upon complainant's title.

The respondent answered, asserting the validity of the certification, patent, and conveyances to it, by virtue of certain acts of Congress, of the Kansas legislature, and of certain proceedings in the General Land Office of the United States which are hereinafter set out in chronological order.

March 3, 1863, Congress passed the following act:

AN ACT for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction, first, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Railroad where said road intersects the Neosho River; second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho Valley to the point where the said first-named road enters the said Neosho Valley; every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads, and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any

section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided, also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act,

except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

* * * * *

SEC. 3. *And be it further enacted*, That the lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said railroads and branches shall be and remain public highways, for the use of the Government of the United States, free from all toll and other charge upon the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: when the governor of said State shall certify to the Secretary of the Interior that any twenty consecutive miles of either of said roads or branches is completed in a good, substantial, and workmanlike manner, as a first-class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with this requirement the said State may cause to be sold all the lands granted as aforesaid situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section of twenty miles of road, and no further. And when the governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied, that another section of said roads or branches, twenty consecutive miles in extent, connecting with the preceding section, is completed as aforesaid, the State may cause to be sold all the lands granted and situated opposite to and within the limit of ten miles of the line of said completed section of road, and ex-

tending the length of said section, and so, from time to time, until said roads and branches are completed. And when the governor of said State shall so certify, and the Secretary of the Interior shall be satisfied, that the whole of said roads and branches and telegraphs are completed in a good, substantial, and workmanlike manner, as first-class railroads and telegraph, the said State may cause to be sold all the remaining lands granted and selected for the purposes indicated in this act situated within the said limits of twenty miles from the line thereof throughout the entire length of said road and branches: *Provided*, That if any part of said roads and branches is not completed within ten years from the passage of this act no further sale shall be made, and the lands unsold shall revert to the United States.

* * * * *

(12 Stat. at Large, vol. 12, page 772.)

March 19, 1863, the Commissioner of the General Land Office issued the following letter of instructions:

EXHIBIT A. (Received at Humboldt May 5, 1863.)

GENERAL LAND OFFICE,
March 19, 1863.

REGISTER AND RECEIVER,
Humboldt, Kansas:

GENTLEMEN: The act of Congress approved March 3, 1863, makes a grant of alternate sections of land to Kansas to aid in the construction, "first, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence and via the Ohio City crossing of the Osage River, to the southern line of the State," "with a branch from Lawrence, by the valley of the Wakarusa River, to the point on the Atchison, Topeka and Santa Fé

Railroad where said road intersects the Neosho River; second, from Atchison, via Topeka, to the western line of the State in the direction of Fort Union," &c., "with a branch from where this last-named road crosses the Neosho down said Neosho Valley to the point where the said first-named road enters the said Neosho Valley."

This law concedes "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads and each of its branches."

The first section further provides that where lands thus granted have been sold, reserved, or otherwise appropriated, or the rights of pre-emption or homestead settlements have attached, other lands designated by odd numbers, in no case to be located further than twenty miles from the lines of said roads and branches, shall be selected by direction of the Secretary of the Interior, &c.

The second section requires the reserved (even) sections within the 10-mile limits to be sold at not less than double the minimum price of the public lands. No such section can, however, be sold at private entry until after it shall have been first offered at or above the increased minimum price, "provided that actual bona fide settlers under the provisions of the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased mimimum price aforesaid; and provided, also, that settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding 80 acres each, anything in this act to the contrary notwithstanding.

The Senators and Representatives in Congress from Kansas have requested the withdrawals of the lands along the lines or routes of the railroads and branches provided for in this act. I inclose a diagram showing the probable lines of said roads and branches, with the 10-mile limits on each side (colored green), and you are hereby directed to withhold from ordinary private sale or location, and also from pre-emption and homestead, with the qualification hereinafter indicated, all the public lands in your district and lying within the 10-mile limits, as designated on said diagram.

Where said lines pass through the surveyed lands the register will proceed at once to lay down, in lead-pencil, on the township plat the 10-mile limits of the reserve on each side thereof, and make the proper notes thereon, showing that the lands embraced within said limits are reserved from sale or entry; and as the surveys progress and the township plats are received he will proceed in like manner to lay down the limits of the reservation and make similar notes, and immediately report the same to this office, so that this order may be strictly observed by withholding the land in said limits.

In virtue, however, of the laws of 1853 and 1854, interests of two classes of settlers are provided for and protected, to wit:

1st. By the said act of March 27th, 1854 (volume 10, page 269), pre-emptors either upon the odd or even sections who had actually settled before the receipt at your office of this order of withdrawal have the right, upon establishing their claims according to law, to pay for them at $1.25 per acre, or in virtue of the act of March 22nd, 1852, to locate the same with warrants.

2nd. In accordance with the said act of March 3rd, 1853 (volume 10, page 244), any pre-emptor who,

subsequent to the receipt as aforesaid of the order of withdrawal and prior to the final allotment of the alternate sections to the railroad, may settle upon and improve the even-numbered (not odd) sections, and who shall establish their pre-emptions according to law, have a right to do so before the same are offered at public sale, rating the land at $2.50 per acre, with the right to pay for the same in cash or as stipulated in the last proviso to the first section of act of March 22nd, 1852 (volume 10, page 3), to pay part in warrants at $1.25 and the residue in cash.

I would also call your attention to the first section of the homestead act, wherein it is provided "that any person," &c., &c., "shall" be entitled to enter one quarter section or a less quantity of unappropriated public land upon which said person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at $1.25 or less per acre, or 80 acres or less of such unappropriated lands at $2.50 per acre, &c.

You will therefore understand from the foregoing—

1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, pre-emption, or homestead entry, except so far as his inceptive rights may have accrued prior to the receipt by you of this order.

2nd. That under the provisions of the acts of 1853 and 1862 the even sections will only be subject to pre-emption at $2.50 per acre from that date, and dealt with at that ratability under the homestead.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

(Record, page 7.)

Upon February 9, 1864, the legislature of Kansas accepted said grant by the following act:

AN ACT to accept a grant of land made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs.

Be it enacted by the legislature of the State of Kansas:

SECTION 1. The State of Kansas hereby accepts the grant of lands made to this State by the Congress of the United States, by an act entitled "An act for a grant of lands in the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," approved March 3, 1863, upon the terms and conditions set forth in said act of Congress.

SEC. 2. In consideration that the Leavenworth, Lawrence and Fort Gibson Railroad and Telegraph Company shall construct a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River to the southern line of the State, in the direction of Galveston Bay, in the State of Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho River, the State of Kansas hereby agrees to grant, bargain, and sell to said Leavenworth, Lawrence and Fort Gibson Railroad Company all that portion of the lands granted to this State by the above-named act of Congress, applicable to the construction of the above-described railroad and telegraph, and the above-described branches thereof, and which shall be selected or located in conformity with the provisions of the above-

mentioned act of Congress. And the said State of Kansas further agrees, and it is hereby enacted, that so soon as said Leavenworth, Lawrence and Fort Gibson Railroad Company shall complete any twenty consecutive miles of either said road or branch, as required by said act of Congress, the governor of this State shall by patent convey to such company all the lands granted as aforesaid, which shall be situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section and no further; and so from time to time until said road and branch shall be completed. And whenever said road, branch, and telegraphs shall be completed, as required by said act of Congress, the governor shall convey to said company all the remaining land granted by said act of Congress and applicable to the construction of said road, branch, and telegraphs: *Provided, however*, That said agreement for the sale of said lands, and all conveyances thereof shall be for the uses and purposes, and subject to the conditions, reversions, and provisions set forth and contained in said act of Congress and in this act: *And provided further*, That at the point of intersection of said road and branch, there shall be an equal division of the lands granted to aid in building said road and branch.

SEC. 3. In consideration that the Atchison, Topeka and Santa Fé Railroad Company, formerly the Atchison and Topeka Railroad Company, shall construct a railroad from the city of Atchison, via Topeka, to the western line of said State, in the direction of Fort Union and Santa Fé, New Mexico, *with a branch from where said road crosses the Neosho down the said Neosho Valley to the point where the Leavenworth, Lawrence and Fort Gibson Railroad enters said Neosho Valley*, the State of Kansas hereby agrees to grant, bar-

gain, and sell to said Atchison, Topeka and Santa Fé Railroad Company all that portion of the lands granted to this State by the above named act of Congress, applicable to the construction of the herein above described railroad and branch thereof, and which shall be selected and located in conformity with the provisions of the above named act of Congress. And the said State does further agree, and it is hereby enacted, that whenever said Atchison, Topeka and Santa Fé Railroad Company shall complete any twenty consecutive miles of either said road or branch, as required by said act of Congress, the governor of this State shall by patent convey to said Atchison, Topeka and Santa Fé Railroad Company all the lands granted as aforesaid, and which shall be situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section and no further; and so, from time to time, until said road and branches shall be completed as required by said act of Congress. And whenever said road and branch shall be thus completed the governor of this State shall convey to said company all the remaining lands granted by said act of Congress, and applicable to the construction of said road and branch: *Provided, however*, That said agreement for the sale of said lands and all conveyances thereof shall be for the uses and purposes, and subject to the conditions, reversions, and provisions set forth and contained in said act of Congress and in this act: *And provided further*, That if the Congress of the United States shall on or before the fourth day of March, 1866, consent that the Neosho Valley Branch of the above named road may be extended so as to intersect the Union Pacific Railroad, Eastern, Division, at or near Fort Riley, and shall make a grant of land for such extension of like amount with that granted per mile for the construction of the herein

above named principal road, then said Atchison, Topeka and Santa Fé Railroad Company shall proceed to construct such branch to such intersection on the terms and conditions herein above prescribed, applicable to the construction of such main road.

SEC. 4. Each of said companies shall file in the office of the secretary of state, within six months after the passage of this act, a copy of the acceptance by the board of directors of such company of the provisions of this act, duly certified under the seal of said company, and in default thereof all grants and provisions herein contained shall, as to the company so failing, cease and be void.

July 1, 1864, Congress passed the following act:

AN ACT making an additional grant of lands to the State of Kansas to aid in the construction of railroad and telegraph lines.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Kansas, to aid in the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: *Provided*, That this grant shall be subject to all the provisions, restrictions, limitations, and conditions in regard to selection and location of lands and otherwise, of an act of Congress approved March three, eighteen hundred and sixty-three, entitled, "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State:" *Provided*, That said railroad shall be a public highway and shall transport troops and munition of war of the United States free of charge.

SEC. 2. *And be it further enacted*, That the branch railroad and telegraph from "Lawrence, by the valley of the Wakarusa River, to a point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho River," to aid in the construction of which a grant of lands was made by the said act of third of March, eighteen hundred and sixty-three, shall be so changed as to run from Lawrence to Emporia, and have and receive the grant of lands made by said act: *Provided*, That the line of railroad and telegraph from Leavenworth, by way of Lawrence and the Ohio City crossing of the Osage River to the southern line of the State in the direction of Galveston Bay, shall run via Baldwin City.

Approved July 1, 1864.

(Statutes at Large, Vol. 15, page 339.)

Upon August 4, 1864, the Atchison, Topeka and Santa Fé Railway Company filed with the secretary of state of Kansas the following acceptance of said act:

Acceptance of land-grant act of March 3, 1863, and of act of legislature of Kansas of February 9, 1864. (Filed with secretary of state of Kansas, August 4, 1864.)

Hon. W. W. H. LAWRENCE,

Secretary of State for Kansas, Topeka, Kansas:

SIR: At a meeting of the board of directors of the Atchison, Topeka and Santa Fé Railroad Company, held at the office of the State treasurer, in the city of Topeka, on the 16th day of February, 1864, a quorum being present, the following resolution was adopted in accordance with the provisions of the 4th section of the act of the Kansas legislature, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads

and telegraphs in said State and to apply the same to the construction of such roads and telegraphs," approved February 9, 1864, to wit:

Resolved, That the Atchison, Topeka and Santa Fé Railroad Company hereby accepts the provisions of an act of the legislature of the State of Kansas, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State and to apply the same to the construction of such roads and telegraphs," approved February 9, 1864.

Now, therefore, I, Samuel C. Pomeroy, president of the Atchison, Topeka and Santa Fé Railroad Company, do hereby certify that the foregoing resolution of acceptance was duly proposed and adopted at the meeting of the board of directors of said Atchison, Topeka and Santa Fé Railroad Company, as specially narrated at the beginning of this instrument.

In testimony whereof I hereunto subscribe my name and cause the seal of our said railroad company to be impressed at the city of New York, on this the twenty-first day of July, A. D. 1864.

[SEAL.] S. C. POMEROY,
President of the Board of Directors of the Atchison, Topeka and Santa Fé Railroad Company.

Attest:

C. K. HOLLIDAY,
Secretary and Directors of the Atchison, Topeka and Santa Fé Railroad Company.

(Record, page 59.)

On the 9th day of March, 1866, the Atchison, Topeka and Santa Fé Railroad Company executed the following

assignment to the Union Pacific Railway Company (Southern Branch).

Assignment by A., T. & S. F. R'l'd Co. to U. P. R'l'y Co., Southern Branch.

This indenture, made this 19th day of March, A. D. 1866, by and between the Atchison, Topeka and Santa Fé Railroad Company, party of the first part, and the Union Pacific Railway Company, Southern Branch, party of the second part, both corporations created and organized under and by virtue of the laws of the State of Kansas:

Witnesseth: That whereas by act of Congress entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," approved March 3, 1863, lands were granted to said State in aid of the construction (among other roads and branches) of a railroad from where the main line of road of the party of the first part crosses the Neosho River, down said river to where the Leavenworth, Lawrence and Fort Gibson railroad enters said Neosho Valley; and whereas by the act of Congress entitled "An act making an additional grant of land to the State of Kansas to aid in the construction of railroad and telegraph lines," approved July the 1st, 1864, an additional grant of lands was made to the State of Kansas to aid the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley on the branch Union Pacific Railroad in said State; and whereas the legislature of the State of Kansas, by its act entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same in the construction of such railroads and

telegraphs," approved February 9th, 1864, did accept the grant of lands so made by Congress; and whereas the legislature of said State by said act did agree to grant, bargain, and sell to the party of the first part hereto, in consideration (among other things) that said party of the first part should construct a railway from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, down the Neosho River to the point where the Leavenworth, Lawrence and Fort Gibson Railroad enters the said Neosho Valley, said road to be constructed as in said act of the legislature and the above recited acts of Congress specifically provided; and did agree, on the completion of sections of said road as therein provided, to convey by patent to the party of the first part hereto all the lands granted as aforesaid by Congress, and applicable to the construction of the road last above mentioned; and whereas the party of the first part did, within six months after the passage of the above-recited act of the legislature of the State of Kansas, file their acceptance of the provisions of the above-recited act, and did thereby covenant and agree with the State of Kansas (among other things), *covenant* that they would construct the road herein indicated, and do and perform all and singular, the conditions and requirements in said acts of said legislature and of Congress contained; and whereas the party of the second part has since that time become a body corporate and politic, created and organized for the purpose of constructing a railroad from a point on the Union Pacific Railroad, Eastern Division, on or near Fort Riley, to the southern boundary of the State of Kansas, by way of the Neosho Valley, and on the route of road contemplated in said acts of Congress and said legislature; and whereas the legislature of the State of Kansas has made to the said party of the second part a large appropriation to aid in the con-

struction of the line of road last above mentioned; and whereas the great length of the main line of road of the party of the first part must delay the speedy construction of the road in the valley of the Neosho River; and whereas the public good requires that there should be no conflict of rights in the construction of the road in said valley: Therefore, for and in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in further consideration of the premises, covenants, undertakings, and agreements of the party of the second part hereinafter contained and set forth, to be by said party kept, performed, and observed, the party of the first part hath bargained, sold, and assigned, and by these presents doth bargain, sell, and assign and transfer, set and deliver over, to the party of the second part, their representatives and assigns, all the rights, titles, and interests, franchises, authority, privileges, immunities, and liabilities held, acquired, possessed, and enjoyed for constructing, maintaining, operating, and enjoying a railroad from the Union Pacific Railroad, Eastern Division, from a point at or near Fort Riley down the Neosho Valley to where the Leavenworth, Lawrence and Fort Gibson Railroad may enter the Neosho Valley, which rights, titles, interests, franchises, authorities, immunities, and liberties accrued to and became vested in the parties of the first part by virtue of its acceptance of the provisions of the act of the legislature of the State of Kansas above recited, and its promise, covenant, undertaking, and agreement to do and perform all and singular the requirements and conditions of said act of said legislature and the acts of Congress hereinbefore recited and referred to; and in compliance by the party of the second part with the terms, requirements, and conditions of the above-recited acts the party of the first part au-

thorize and empower the party of the second part to receive, hold, and enjoy any lands, property, or effects applicable to the construction of a railroad between the points aforesaid as fully and completely as the party of the first part might have held and enjoyed such lands, property, and effects had this assignment or transfer never been made.

In consideration of the premises, and the further consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the party of the second part, their legal representatives and assigns, further agree, covenant, and promise with and to the party of the first part, their successors, legal representatives, and assigns, that they will and faithfully do and perform all and singular the duties, obligations, and requirements imposed upon said party of the first part, and assumed and undertaken by said party under the several acts of Congress and of the State of Kansas heretofore cited and hereby referred to as more fully setting forth the obligations and liabilities hereby assumed, and that they will construct, maintain, and operate a railroad and telegraph from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley down the Neosho River Valley to where the Leavenworth, Lawrence and Fort Gibson Railroad may enter said valley, within the time required and on the terms and conditions prescribed in said acts; and the party of the second part further agree, covenant, and promise the party of the first part that they will protect and hold free from harm or loss in property or estate the party of the first part against all forfeitures or penalties incurred or adjudged against said last-named party in consequence of any defalut or failure made or permitted after the date hereof in the construction, maintenance, or operation of said road or telegraph embraced in this agreement; and the said party of the

second part further agree that they will repay any and all moneys necessarily expended up to the date of these presents for engineer's survey, plat, and profiles by the party of the first part upon the above-named line of railroad on the delivery to them of said engineer's maps, plats, and profiles upon which such expenditures were made.

In testimony whereof the parties hereunto have subscribed their names and affixed their seals by order of the respective board of directors.

On behalf of the Atchison, Topeka and Santa Fé Railroad Company—

SAMUEL C. POMEROY, *President.* [SEAL.]
WILLIS GAYLORD, *Secretary.* [SEAL.]

In behalf—the Union Pacific Railway, Southern Branch—

R. McBRATNEY, [L. S.]
N. S. GOSS, [L. S.]
Agents and Attorneys.

(The latter compuny has no seal.)

I, R. A. Barker, secretary of state, do hereby certify that the foregoing is a true and correct copy of the original on file in this office.

In testimony whereof I have subscribed my name and affixed the great seal of the State this 15th day of January, A. D. 1867.

[SEAL.] R. A. BARKER,
Secretary of State.

(Record, pages 47 to 50.)

Upon July 26, 1866, Congress passed the following act:

AN ACT granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent author-

ity, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

* * * * *

SEC. 3. *And be it further enacted*, That the grants hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named and coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the first

instance, until said road shall be completed: *Provided*, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

SEC. 4. *And be it further enacted*, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

* * * * *

SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

SEC. 8. *And be it further enacted*, That said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas Rivers, to Fort Smith in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds

for stations, buildings, work-shops, machine-shops, switches, side tracks, turn-tables, and water stations.

* * * * *

SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or any State which may have been heretofore or shall hereafter be organized by any act of the Congress of the United States, may connect with and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand River, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest or the interest of the United States.

Approved July 26, 1866.

(U. S. Statutes at Large, vol. 14, page 289.)

Upon December 3, 1866, the Union Pacific Railroad Company, Southern Branch, filed its map of definite location with the Secretary of the Interior, duly certified and indorsed, as follows:

STATE OF KANSAS,
County of Shawnee, ss:

G. M. WALKER, of Lawrence, in Douglas County and State of Kansas, being duly sworn, deposes and says that he is the chief engineer of the Union Pacific Railway Company, Southern Branch, and has been such chief engineer since the 1st day of September, 1865; and that, as said chief engineer, did survey and mark upon the ground the line or route of the said railway from Junction City, near Fort Riley, Kans., to Council Grove, Kans., at the times respectively designated by dates which are included between flag-staffs upon and along the route of said railway, as delineated on this map; that from Coun-

cil Grove to Emporia the line or route of said railway was surveyed by O. B. Gunn, chief engineer of the Atchison, Topeka and Santa Fé Railroad Company, in December, 1865, the field-notes of which have not yet been received by deponent, but he has possession of the map of said survey; that said engineer of the Union Pacific Railway, Southern Branch, made, from the 24th to the 28th day of September, 1866 instant, made an examination and fixed route of said railway from Emporia to the northern boundary of the Osage Indian Reservation, near Humboldt, Kans.

G. M. AKIN,
Chief of Engineers.

Sworn and subscribed this 17th day of November, 1866, before me.

[SEAL.] T. R. MILLS,
Notary Public.

[Office of the Union Pacific Railroad Company, Southern Branch, assignees of the Atchison, Topeka and Santa Fé Railroad Company.]

NOVEMBER 17, 1866.

It is hereby certified that in pursuance of the act of the legislative assembly of the State of Kansas, approved February 9, A. D. 1864, entitled "An act to accept a grant of lands made to the State Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs," this map shows, in connection with the public surveys, the actually surveyed line of route of "the Union Pacific Railroad, Southern Branch, from Junction City, near Fort Riley, in the State of Kansas, to the northern boundary line of the Osage Indian Reservation, at or near the

town of Humboldt," as per affidavit of the chief engineer of said railroad, as definitely fixed, in compliance with the act of Congress, approved March 3, A. D., 1863, and in pursuance of the resolution of the board of directors of said railroad company, passed August 10, A. D. 1866; and that the dates of the field work thereof are truly indicated along the line from station to station upon the map.

In testimony whereof the Union Pacific Railroad Company, Southern Branch, has hereunto attached its corporate seal and caused the same to be signed by the vice-president and acting president, and chief engineer, at Topeka, in the day and year first above written.

[SEAL.]

ANDREW AKIN,
Acting President.
G. M. WALKER,
Chief Engineer.

Attest:
P. B. MASON,
Per W. R. HOEG,
Acting Secretary.

I, Samuel J. Crawford, governor of the State of Kansas, do hereby certify that this plat or map of the Union Pacific Railroad, Southern Branch, has been duly filed in my office by the railroad company, who are the legal assignees of the Neosho Valley Branch of the Atchison, Topeka and Santa Fé Railroad Company, and shows, in connection with the public surveys, the location of the line or route, as actually surveyed, of the Union Pacific Railroad, Southern Branch, from Junction City, near Fort Riley, in the State of Kansas, to the northern boundary line of the Osage Indian Reservation, at or near the town of Humboldt, as definitely fixed, in compliance with the act of Congress, approved March

3, A. D. 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," with the act of the legislative assembly of the State of Kansas, approved February 9, A. D. 1864, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs," granting certain lands to the said road herein named.

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Kansas.

Done at Topeka this 17th day of November, A. D. 1866.

[L. S.] S. J. CRAWFORD,
Governor.

Attest:

R. G. BARKER,
Secretary of State.

On December 26th, 1866, it filed the following acceptance with the same officer:

Acceptance of Act of July 26, 1866, by M., K. and T. R'l'y Co.

To the Secretary of the Interior Department, Washington, D. C.:

SIR: This is to certify that at a legally convened meeting of the directors of the Union Pacific Railway (Southern Branch) Company, the same being a corporation originally chartered under the laws of the State of Kansas, at Emporia, Lyon County, Kan-

sas, on the 8th day of August, A. D. 1866, the following resolutions were adopted:

Resolved, That the terms, conditions, and impositions of a bill granting lands to the State of Kansas to aid in the construction of the Southern branch of the Union Pacific Railway and Telegraph from Ft. Riley, Kansas, to Ft. Smith, Arkansas, passed by Congress 24th day of July, A. D. 1866, and approved by the President 26th day of July, A. D. 1866, be, and the same are hereby, accepted by the said Union Pacific Railway (Southern Branch) Company; and

Resolved, That a copy of this resolution, properly authenticated, be forwarded to the Secretary of the Interior.

Given under our hands and the corporate seal of the Union Pacific Railway (Southern Branch) Company, at Emporia, Lyon County, Kansas, this sixth (6th) day of December, A. D. 1866.

N. S. GROSS,
Pres. U. P. R'l'y (Southern Branch) Co.

[Seal Union Pacific Railway, incorporated Sept. 25, 1865, Southern Branch.]

P. B. MAXSON,
Sec. U. P. R'l'y (Southern Branch) Co.

Endorsed: "Union Pacific, Southern Branch. Emporia, Kans.," December 6, 1866. P. B. Maxson. Resolution of the board of directors of the U. P. R. R., S. B., accepting the act of Congress approved July 24, 1866. Ack. Jan'y 4, 1867.

(Rec., page 76.)

And afterwards the following correspondence took place (Rec., pages 60 to 63):

Letter of Goss and Cox of Jan. 3, 1867, in relation to map of definite location, certified to by Secretary of Interior.

WASHINGTON, D. C., *January* 3, 1867.

Hon. O. H. BROWNING,
Secretary of the Interior:

SIR: The map of the definite location of the line of the Union Pacific Railway, Southern Branch, from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage lands, was forwarded to you 17th Nov., 1866, from Topeka by the governor of Kansas, and received at your office November 26th, 1866, but for some unaccountable reason, without a letter of transmittal. Hon. R. McBratney's attention having been called to the fact, filed a letter of transmittal under date of 26th November, 1866, which contains errors and omissions which the company desire to correct.

We therefore respectfully request that this letter be placed on file, as declaratory of the purposes for which the said company presented and filed said map.

The map was filed to show the line of said road as definitely located by said company from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage Reservation. An additional map will be filed as soon as the surveys of the line are completed from said northern boundary of the Osage Indian Reservation to the southern boundary to the State of Kansas.

In presenting the map heretofore filed as above stated the company do not wish to be regarded as precluded by such location of the line from making

any reasonable changes hereafter when the road is being constructed which further examination of the route shall dictate as expedient, nor as being subject, by reason of such changes, to a loss of any part of the lands granted.

We desire further to say that we claim on behalf of said company all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka, and Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants, and that we also claim all the lands granted to the State of Kansas for the Union Pacific Railway (Southern Branch) Company by the act of Congress approved 26 July, 1866.

In behalf of said Union Pacific Railway (Southern Branch) Company, we therefore respectfully request that the lands granted by said acts between Junction City and the northern boundary of the said Osage Indian Reservation, within the limits prescribed in said acts, from the line of the road as designated in said plat be reserved from sale until the lands of said company be selected.

Very respectfully, your obedient servants,

N. S. GOSS,
President and Att'y.
JOHN T. COX,
Agent and Att'y, U. P. R. W., S. B., Co.

WASHINGTON, D. C., *January* 3, 1867.

Union Pacific, S. Branch, N. S. Goss, president:

In relation to the filing of the map showing the definite location of the Union Pacific Railway (South-

ern Branch) Company from Junction City, near Fort Riley, Kansas, to the northern boundary of the Osage lands.

Answered January 7, 1867.

(L., G. R. R., vol. 1, 140.)

Engineer office, Jan. 5, 1867, Department of Interior.

Defendant's proof No. 5, Exhibit B.

DEPARTMENT OF THE INTERIOR,
Washington, Feb. 6, 1884.

I, H. M. Teller, Secretary of the Interior, hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department to be affixed the day and year first above written.

[SEAL.] H. M. TELLER,
Secretary.

Defendant's proof No. 5, Exhibit B.

Letter of O. H. Browning, Secretary of Interior, January 7, 1867. Certified to by Secretary of Interior.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 7, 1867.

SIR: I have received the joint letter of yourself and J. T. Cox, esq., dated the 3d instant, requesting that it be placed on file as declaratory of the purposes for which the Union Pacific Railway (Southern Branch) Company presented and filed a map of the definite location of the line of said road from Junction City, at or near Fort Riley, Kansas, to the northern boundary of the Osage lands.

You state that you "claim on behalf of said company all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka and Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants," and also all the lands granted to the State of Kansas for the Union Pacific Railway (Southern Branch) Company by the act of Congress approved July 26, 1866.

While this Department doubts not the rights of the Union Pacific Railway (Southern Branch) Company under the latter act, it cannot recognize said company as entitled to the benefits of the acts of Congress approved March 3, 1863, and July 1, 1864, until it shall have established, by due proofs, a title to all the rights and interest vested under said acts in the Atchison, Topeka and Santa Fé Railroad Company.

The map, however, will be filed and appropriate action taken in regard to it under the act of Congress approved July 26, 1866.

I am, sir, very respectfully, your obedient servant,

O. H. BROWNING,

Secretary.

N. S. Goss, esq., president Union Pacific Railway, S. B., Co., care Jno. T. Cox, esq., Senate P. O., Washington, D. C.

Defendant's proof No. 6, *Exhibit B.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 6th, 1884.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy

of a letter dated January 31st, 1867, and addressed to Hon. Secretary of the Interior by N. S. Goss, president and attorney, and J. T. Cox, agent and attorney of the Union Pacific Railway Company, Southern Branch, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of the General Land Office.

Letter of Goss and Cox, of January 31, 1867, in regard to assignment certified to by Commissioner of General Land Office.

WASHINGTON, D. C., *January* 31, 1867.

Hon. O. H. BROWNING,
Secretary of the Interior.

SIR: We have the honor to acknowledge the receipt of yours of the 7th instant, in which you state that—

"While this Department doubt not the rights of the Union Pacific Railway (Southern Branch) Company, under the latter acts (referring to the act of Congress approved July 26, 1866), it cannot recognize said company as entitled to the benefits of the acts of Congress approved March 3, 1863, and July 1, 1864, until it shall have established, by due proofs, a title to all the rights and interests vested under said acts in the Atchison, Topeka and Santa Fé Railroad Company."

In compliance with your request we herewith transmit a certified copy of the transfer and assignment from the Atchison, Topeka and Santa Fé Railroad Company to the Union Pacific Railway (Southern

Branch) Company of all the rights and interests vested in the Neosho Valley Branch of said railroad company under the acts of Congress approved March 3, 1863, and July 1, 1864, and of the act of the legislature of the State of Kansas, approved February 9, 1864, accepting said grants.

We would therefore respectfully ask that it be placed on file and accepted as the proof required.

Yours truly, &c.,

N. S. GOSS,
President and Attorney.
JOHN T. COX,
Agent and Attorney Union Pacific Railway (Southern Branch) Company.

Defendant's Proof No. 7, Exhibit B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 17, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter, dated March 19, 1867, addressed to the register and receiver at Humboldt, Kansas, and directing them to withhold from entry and sale, for the benefit of the grant of July 26, 1866, certain lands in the limits of said grant in their district, is a true and literal exemplification of the original letter as shown by the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of General Land Office.

Upon February 26, 1867, the Kansas legislature passed the following act:

RESOLUTION ratifying the transfer of certain railroad lands.

Resolved by the legislature of the State of Kansas, That the transfer and assignment of the Atchison, Topeka and Santa Fé Railroad Company, made and executed on the 19th day of March, A. D. 1866, to the Union Pacific Railway Company, Southern Branch, of all the rights, titles, interests, authority, privileges, immunities, and liberties, held, acquired, possessed, and enjoyed, for constructing, maintaining, operating, and enjoying a railroad from a point on the Union Pacific Railroad, Eastern Division, at or near Fort Riley, down the Neosho Valley to where the Leavenworth, Lawrence and Fort Gibson Railroad may intersect the Neosho Valley, be, and the same is hereby, ratified and confirmed: *Provided*, The term franchise, as used in the said transfer and assignment, shall not be construed to impair in any way the charter of said Atchison, Topeka and Santa Fé Railroad Company.

Approved February 26, 1867.

S. J. CRAWFORD,
Governor.

March 25, 1867, the Secretary of the Interior addressed the following communication to the Commissioner of the General Land Office:

Decision of Secretary of Interior.

Decision of the Secretary of the Interior directing withdrawal of land for U. P. R'l'y Co., S. B., certified to by the Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
Washington D. C., March 25, 1867.

SIR: Under date of the 19th ultimo I sent to you a map of the Union Pacific Railway, Southern Branch,

showing the route of said road in Kansas from Junction City down the Neosho Valley to the northern boundary of the Osage lands.

A grant of land was made to the State of Kansas to aid in the construction of this road July 26, 1866. (Stat. 1866, page 289.)

By acts of Congress approved March 3d, 1863, and July 1, 1864, grants of land were made to the said State to aid in the construction of certain other railroads. By said act of 1863 one of these roads and its branch, the Atchison, Topeka, and Santa Fé railroad, is from Atchison, via Topeka and (as amended by act of 1864) Emporia, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, and the branch, from where the main line crosses the Neosho (at Emporia), down the Neosho Valley to where the road from Leavenworth and Lawrence enters said valley.

The said act of 1864 is for a railroad from Emporia to Junction City.

The ground from Emporia southwardly is covered by the grants of 1863 and 1866, and from that point northwardly by the grants of 1864 and 1866.

N. S. Goss, esq., president of the said Union Pacific Railway Company, South Branch, claims on behalf of said company "all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka, and Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants," as well as the lands granted by the said act of July 26, 1866. A certified copy of that assignment, also a certified copy of resolution No. 6 of the legislature of Kansas, ap-

proved February 26, 1867, ratifying the same, have been filed by Mr. Goss.

The grant of the State of Kansas by the said acts of 1863 and 1864 is the alternate odd-numbered sections for ten sections in width on each side of the roads and branches, with the right of indemnity for lands disposed of from odd sections outside of ten and within twenty miles of the same, provided, "that any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act," except when it is found necessary to locate the routes through such reserved lands; in that case, the right of way is granted subject to the approval of the President of the United States.

The lands thus granted are subject to the disposal of the legislature for the purpose of aiding in the construction of the railroads exclusively, "and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act provided," which is, that the State may sell 120 sections before any road is built, and thereafter 120 sections upon the completion of every twenty miles, "provided that if any part of said roads and branches is not completed within ten years from the passage of this act no further sale shall be made, and the lands unsold shall revert to the United States."

The grant to Kansas by said act of July 26, 1866, is for alternate odd-numbered sections to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile, with right of indemnity outside of ten and within twenty miles from both the odd and even sections, provided that any and all lands reserved to the United States

by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever are reserved and excepted from the act, except the right of way of 200 feet in width through such reserved lands, subject to the approval of the President of the United States.

This grant of lands is declared to be made upon the condition that said company, after its construction, shall keep it in repair and use, and shall at all times transport United States troops, supplies, and public stores free from all cost or charge therefor to the Government, and the granted lands are to inure to the benefit of said company upon the governor of Kansas certifying to the completion of any section of ten consecutive miles of road, the lands within the limits of such completed section and coterminus with the same are to be patented to the company. Upon said company filing with the Secretary of the Interior maps of its line designating the route thereof it is made his duty to withdraw from market the lands granted in such manner as to effect the purpose of the act and subserve the public interest. The right of way through the public lands is granted to said company, its successors and assigns, to the extent of 200 feet where the same may pass through the public domain; also all necessary ground for station-houses, workshops, &c., with the right to take from the public lands adjacent to the line of said road material for the construction thereof.

The acceptance by said company of the terms and conditions of the grant, duly executed, has been filed.

The said railroad company is also authorized to extend and construct its railroad from the southern boundary of Kansas through the Indian Territory, upon certain conditions.

The State of Kansas will, upon complying with the terms, conditions, and sipulations of said acts of March 3, 1863, and July 1, 1864, become entitled to the lands granted by said acts. To enable the State to do so the land may be withdrawn for that purpose, and you will issue the necessary instructions to the land officers of Kansas, if such instructions have not already been issued.

In virtue of said assignment and the ratification thereof by the legislature of the State of Kansas, the lands inuring to the State under said grants of 1863 and 1864 will be adjusted to the State for the benefit of said Union Pacific Railway (Southern Branch) Company upon the principles heretofore established and now in force; and then, if any lands remain to the United States of odd sections within the limits of twenty miles on each side of the railroad between the termini mentioned, the said Union Pacific Railway (Southern Branch) Company will become entitled to patents for such odd sections, and also for such even sections as remain to the United States outside the ten and within twenty miles of the road, upon complying with all the terms, conditions, and stipulations of said act of July 26, 1866.

If the even sections of land remaining to the United States outside of the 10 and within the 20 miles have not been withdrawn, you will issue the necessary instructions to the land officers in Kansas withdrawing the same.

The map of definite location of the route of said railroad, now on file in your office, will become the basis of adjustment of the grants under said acts.

The certified copies of assignment and act of the legislature referred to are herewith to be placed on the files of your office.

You will send a copy of this letter to the governor of Kansas.

Very respectfully, your obedient servant,

O. H. BROWNING,
Secretary.

Hon. JOS. S. WILSON,
Comm'r of the Gen'l Land Office.

(Rec., pages 65 to 67.)

Early in 1870 the Union Pacific Railroad Company, Southern Branch, changed its name to Missouri, Kansas and Texas Railroad Company.

On July 25, 1870, the Missouri, Kansas and Texas Railroad Company filed with the Secretary a map of the complete line of its road, indorsed as follows:

DEPARTMENT OF THE INTERIOR,
Washington, D. C. July 25th, 1870.

SIR: I transmit herewith for filing a map showing the completed portion of the line of the road of the Missouri, Kansas and Texas Railroad Company from Junction City to the southern boundary of the State of Kansas, attached to which is a certificate of the governor of said State that that portion of the said road had been constructed and equipped as required by the acts of Congress granting lands to aid in its construction.

Very respectfully, your ob't servant,

J. D. COX, *Secretary.*

The COM'R OF THE GENERAL LAND OFFICE.

STATE OF KANSAS,
County of Davis, ss:

O. B. Gunn, of Junction City, in said county and State, being duly sworn, deposeth and says that he is chief engineer of the Union Pacific Railroad Com-

pany, Southern Branch, now known as the Missouri, Kansas and Texas Railway Co., and has been such engineer since Nov. 1, 1869; that the line on this map, commencing at Junction City, at or near the center of section twelve (12), in township twelve (12) south, of range five (5) east, and terminating at the southern line of the State of Kansas, at a point three thousand five hundred and ten (3,510) feet east of the twenty-seventh (27th) mile post or mound and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile post or mound on said southern line of the State of Kansas, shows the line of the route of said road in connection with the lines of the public surveys; that the road between those points has been completed and equipped as required by law.

O. B. GUNN,
Chief Engineer.

Sworn and subscribed this 9th day of July, 1870, before me—

[SEAL.] THOMAS HOOKEY,
Notary Public.

It is hereby certified that O. B. Gunn is the chief engineer of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas and Texas Railway Co., and that the location of the road as represented on this map is correct and approved by the company, and also that the said portion of the said road has been completed and equipped in all respects as required by law.

LEVI PARSONS,
President.

Attest:
H. B. HENSON, *Secretary.*

EXECUTIVE OFFICE,
Topeka, Kansas, July 13, 1870.

I, James M. Harvey, governor of the State of Kansas, do hereby certify that this map and profile of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas and Texas Railway Co., has been filed in my office by the said railway company, and shows that portion of the said railroad commencing at Junction City, at or near the center of section 12, town 12 south, range 5 east, and ending — southern line of the State of Kansas at *a* — thousand five hundred and ten (3,510) feet east of the 27th mile post, and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile post on said southern line of the State of Kansas, which has been completed and equipped as required by the acts of Congress granting lands to the State and to the said railroad company, approved March 3d, 1863, July 1st, 1864, and July 26th, 1866, and the act of the legislative assembly of the State of Kansas approved February 9th, 1864, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs."

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State.

Done at Topeka this thirteenth day of July, 1870.

[SEAL.] JAMES M. HARVEY,
Governor.

Attest:
THOMAS MOONLIGHT,
Secretary of State.

(Here follows diagram marked p. 92. Record pages 51 and 52.)

August 8, 1872, the Missouri, Kansas and Texas Railroad Company and the Leavenworth, Lawrence and Galveston Railway Company presented at the land office in Independence, Kans., the following document:

Complainant's Proof No. 7, *Exhibit A.*

Defendant's Proof No. 10, *Exhibit B.*

List of lands selected August 8, 1872, by the M., K. and T. R'l'y Co., and the L., L. and G. R'l'y Co.

STATE OF KANSAS, U. S. LAND OFFICE,
Independence, August 8, 1872.

The Missouri, Kansas and Texas Railway Company (formerly the Union Pacific Railway, Southern Branch) and the Leavenworth, Lawrence and Galveston Railway Company, under and by virtue of the act of Congress entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railaoads and telegraphs in said State," approved 3d March, 1863, as to both of said companies, and "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," approved 26th July, 1866, as to the Missouri, Kansas and Texas Railway Company, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of public lands claimed by said companies as a portion of the lands within the indemnity limits common to both roads, inuring to them, and to which they are entitled under and by virtue of the grants and provisions of the said acts of Congress, and the location of the lines of routes of

the roads of the said companies, being for that portion of the road of the Missouri, Kansas and Texas Railway Company commencing at the north line of (NW. ¼) northwest quarter of section five (5), township twenty-three (23) south, of range sixteen (16) east, and ending at the south line of lot one of section twenty-nine (29), township twenty-six (26) south, of range eighteen (18); and for that portion of the road of the Leavenworth, Lawrence, and Galveston Railroad commencing at the north line of the northwest quarter of section six (6), township twenty-three (23) south, of range nineteen (19) east, and ending at the south line of lot three, section twenty-seven, township twenty-six south, of range eighteen (18) east, the selections being particularly described as follows, to wit:

(Here follows description of lands, including those in controversy; total acreage being 24,345.99.)

STATE OF KANSAS, *County of* ——:

I, N. S. Goss, being duly sworn, depose and say that I am land acting commissioner and the land agent of the Missouri, Kansas and Texas Railway Company, formerly the Union Pacific Railway, Southern Branch; and I, John W. Scott, being duly sworn, depose and say that I am land commissioner and the land agent of the Leavenworth, Lawrence and Galveston Railroad Company; that the foregoing list of lands which we hereby jointly selected is a correct list of a portion of the public lands claimed by the said Missouri, Kansas and Texas Railway Company and the said Leavenworth, Lawrence and Galveston Railroad Company as inuring to them to aid in the construction of the railroads from Fort Riley, Kansas, to Fort Smith, Arkansas, and from the city of Leavenworth by way of the city of Lawrence to the southern line of the State in the direction

of Galveston Bay, Texas, for which a grant of land was made by the acts of Congress approved 3d March, 1863, and 26th July, 1866; that said lands are vacant, unappropriated, and are not interdicted mineral, nor reserved land, and are of the character contemplated by the grant, being within the limits of twenty miles of each side of the lines of the routes, for a continuous distance of twenty-three miles, of the Missouri, Kansas and Texas Railway, and of twenty-two miles of the Leavenworth, Lawrence and Galveston Railroad, being for that portion of each road starting from the north line of NW. quarter of section five, township twenty-three south, of range sixteen (16) east, as to the Missouri, Kansas and Texas Railway, and from the north line of northwest quarter of section six, township twenty-three south, of range nineteen east, as to the Leavenworth, Lawrence and Galveston Railroad, and ending as to the first-named road at the south line of lot one of section twenty-nine, township twenty-six south, of range eighteen east, and as to the last-named road, at the south line of lot three, of section twenty-seven, township twenty-six south, of range eighteen east, the said lands being in the indemnity limits of both said railroads, and the same are only partial selections of the lands claimed by the said railroad companies, the right being reserved to make other and further joint selections of such lands within their joint limits as may be found after investigation to inure to them.

JNO. W. SCOTT,
Land Commissioner of L., L. and G. R. R. Co.
N. S. GOSS,
Acting Land Commissioner M., K. and T. R'Vy Co.

Subscribed and sworn to before me this 8th day of August, A. D. 1872.

P. B. MAXSON,
Register.

I, P. B. Maxson, register of the land office at Independence, Kansas, do hereby certify that the above affidavit was taken and subscribed before me this 8th day of August, 1872.

P. B. MAXSON,
Register.

UNITED STATES LAND OFFICE,
Independence, Kansas, August 8, 1872.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Missouri, Kansas and Texas Railway Company (formerly the Union Pacific Railway, Southern Branch), and by the Leavenworth, Lawrence and Galveston Railroad Company, under the grants to the State of Kansas by acts of Congress approved 3d March, 1863, as to both of said roads, and by act of Congress approved 26th July, 1866, as to the Missouri, Kansas and Texas Railway Company, and selected jointly by Isaac T. Goodnow, the duly authorized agent of the Missouri, Kansas and Texas Railway Company, and by John W. Scott, the duly authorized agent of the Leavenworth, Lawrence and Galveston Railroad Company, and we have tested the accuracy of the said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of twenty miles on each side of said roads, and that the same are not nor in any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an

assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by circular of instructions, dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices, and that the said companies have paid to the undersigned, the receiver, the full sum of $304 in full payment and discharge of said fees.

P. B. MAXSON,
Register.
M. W. REYNOLDS,
Receiver.

(Rec., pages 37 to 41.)

To the list of lands thus selected jointly, the Leavenworth, Lawrence and Galveston Railroad Company appended the following relinquishment:

For the purpose of partition, the Leavenworth, Lawrence and Galveston R. R. Company, by the hand of its president and over the seal of the company, hereby relinquish all their right, title, and interest in and to the aforedescribed lands (embraced in Independence joint indemnity list No. 3) to the Missouri, Kansas, and Texas Railway Company, their successors and assigns, and request that patents therefor may issue to said Missouri, Kansas and Texas Railway Company.

In witness whereof the Leavenworth, Lawrence and Galveston R. R. Co. have as aforesaid signed and sealed, at Chicago, in the State of Illinois, this thirteenth day of December, A. D. 1872.

[SEAL.] J. M. WALKER,
President.

Endorsed: No. 4118. Filed Dec. 20, 1884. A. S. Thomas, clerk.

(Rec., page 46.)

That list was, on April 7th, 1873, certified to the State of Kansas as follows:

List of lands and certificate of Commissioner of General Land Office.

Missouri, Kansas and Texas Railroad—Kansas.

List of lands in the district of lands subject to sale at Topeka and Independence, within the twenty-mile limits, granted to the State of Kansas by the act of Congress approved the 3d of March, 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," designated by odd numbers for ten sections in width on each side of said railroad, which the United States had not sold or to which the right of pre-emption or homestead had not attached. Including those in controversy.

(Rec., page 53.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 7, 1873.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to seven, inclusive, is a correct and true list of the tracts of land within the twenty-mile limits granted to the State of Kansas by the act of Congress approved March 3, 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," being the vacant and unappropriated lands in the alternate sections, designated by odd numbers, for ten sections in width on each side of the Missouri, Kansas and Texas Railroad in Kansas.

And it is further shown by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25, 1870, and map therewith, duly certified by the governor of the State of Kansas, that the said Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of **Kansas.**

And they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of the said act of March 3, 1863, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, April 10, 1873.

Approved, subject to the conditions above mentioned.

C. DELANO, *Secretary.*

(Record, page 56.

This certification was forwarded with the following letter to the governor of Kansas:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 12, 1873.

Hon. THOS. A. OSBORN,
Governor of Kansas, Topeka, Kansas.

SIR: Herewith I have the honor to transmit exemplified copy of approved list No. 5, embracing

3,386.51 acres, selected in the Topeka district, and 24,345.99 acres in the Independence district, total 27,732.50 acres, as lands inuring under the act of March 3, 1863, to the State of Kansas for the benefit of "Missouri, Kansas and Texas Railroad Company."

The list was returned by you in conformity with our letter of 18th ulto., for correction in certificate, under act March 3, 1863, which has been properly made.

Please acknowledge its receipt.

I am, sir, very respectfully,

WILLIS DRUMMOND,
Commissioner.

(Record, p. 68).

On the 19th of May, 1873, these lands were patented to the Missouri, Kansas and Texas Railroad Company, as follows:

EXHIBIT D.

The State of Kansas to all to whom these presents shall come, greeting:

Whereas the Missouri, Kansas and Texas Railway Co., having constructed a railroad and telegraph line from Junction City to the southern boundary of the State of Kansas, is entitled under the provisions of the act of Congress approved March 3, one thousand eight hundred and sixty-three (1863), entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State," and of the act of the legislature of the State of Kansas, approved February 9th, one thousand eight hundred and sixty-four (1864), entitled "An act to accept a grant of lands

made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such railroads and telegraphs," to the following described tracts of land as certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior, April 10th, one thousand eight hundred and seventy-three (1873), said to contain twenty-seven thousand seven hundred and thirty-two and $\frac{50}{100}$ acres, namely:

Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w ½ s e	13	24	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½, n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
W ½, n w, s e, & e ½ s e	35	25	20
S ½	19	25	21
W ½	29	25	21
All	31	25	21
All	1	26	20
N ½ s w ¼, w ½ s e, & n e s e	3	26	20
All	5	26	20
E ½ n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20
All	13	26	20
All	15	26	20
All	17	26	20
E ½ n e & e ½ s e ¼	19	26	20
E ½ e ½, s w & s w s w	21	26	20
All	23	26	20
Lots 1 & 2	25	26	20
Lots 1 & 2	27	26	20
Lots 1 & 2	29	26	20
W ½	5	26	21
All	7	26	21
W ½ n e ¼, w ½ s e ¼, & w ½	17	26	21
All	19	26	21
Lots 1 & 2	29	26	21

Know ye, that the State of Kansas, in the consideration of the premises and in conformity with the said laws, has given and granted, and by these presents does give and grant, unto the Missouri, Kansas and Texas Railway Company and assigns the said tracts above described, to have and to hold the same, together with all rights, privileges, immunities, and appurtenances of whatsoever nature accruing under the provisions of the laws relating thereto, and in accordance with the act of Congress of March 3d, 1863, set forth in the foregoing, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing.

In testimony whereof I, Thomas A. Osborne, governor of the State of Kansas, have caused these letters to be made patent and the seal of the State to be hereunto affixed. Given under my hand, at the city of Topeka, this nineteenth (19) day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh, and of the thirteenth year of the State.

THOMAS A. OSBORN.

By the governor:

[L. S.] W. H. SMALLWOOD,
Secretary of State.

(Record, pages 10, 11, and 12.)

And on the dates contained herein the following conveyances were executed by the Missouri, Kansas and Texas Railroad Company to the appellant:

EXHIBIT E.

Know all men by these presents that the Leavenworth, Lawrence and Galveston Railroad Company

and the Missouri, Kansas and Texas Railroad Company, by their agreement made and entered into February 20th, A. D. 1871, and said agreement having been duly and subsequently ratified by the boards of directors of said companies, did determine upon the basis of a partition of certain lands situated in the State of Kansas, and granted to said companies by the United States and by the State of Kansas, the said State having received the same from the United States, and lying within the conflicting land-grant limits of the roads of said companies in said State of Kansas, and inasmuch as the partitions and divisions of said lands contemplated in said agreement has been made, so far as the lands hereinafter mentioned are concerned, to the mutual satisfaction of said companies;

Now, therefore, in pursuance of said agreement, and in consideration of one dollar to be in hand paid, the said Missouri, Kansas and Texas Railroad Company, party of the first part, doth grant, bargain, sell, release, and quitclaim unto the said Leavenworth, Lawrence and Galveston Railroad Company, party of the second part, the following tracts of land lying and being situate in the State of Kansas, to wit:

Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w ½ s e	13	24	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½ n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
W ½ n w, s e & e ½ s e	35	25	20
S ½	19	25	21

Subdivisions.	Sec.	T's.	R's.
W ½	29	25	21
All	31	25	21
All	1	26	20
N ½ s w ¼, w ½ s e, & n e s e	3	26	20
All	5	26	20
E ½ n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20
All	13	26	20
All	15	26	20
All	17	26	20
E ½ n e & e ½ s e ¼	19	26	20
E ½ e ½, s w & s w s w	21	26	20
All	23	26	20
Lots 1 & 2	25	26	20
Lots 1 & 2	27	26	20
Lots 1 & 2	29	26	20
W ½	5	26	21
All	7	26	21
W ½ n e ¼, w ½ s e ¼, & w ½	17	26	21
All	19	26	21
Lots 1 & 2	29	26	21

In Allen County; and the said party of the first part doth hereby covenant and agree to and with the party of the second part that it has not made, suffered, or caused to be made any conveyance, lien, or incumbrance of any nature whatsoever on the above-described lands, or any part thereof, and that it will forever warrant and defend the title to said lands, and every part thereof, against all persons whomsoever claiming by, through, or under the party of the first part, but against none other; and the party of the first part further covenants and agrees to and with the party of the second part that this instrument shall operate to convey to the party of the second part any other or further title that the party of the first part may hereafter acquire or receive through, by, or in virtue of any law of the United States, or of the State of Kansas, or treaty of the United States with any Indian tribe, to said above-described lands, or any part thereof; and hereby further covenants and

agrees to execute and deliver to said party of the second part, its successors and assigns, any further assurance or conveyance which may be necessary to carry out and effectuate the object and purpose of this instrument.

In witness whereof the party of the first part has affixed its corporate seal unto this instrument, and caused the same to be signed by its president, this ninth day of October, A. D. 1871.

[SEAL.] MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
By LEVI PARSONS,
President.

Attest:
H. B. HENSON,
Secretary.

(Here follows the acknowledgment of the above instrument.)

EXHIBIT F.

This indenture, made this twenty-eighth day of February, one thousand eight hundred and seventy-two (1872), between the Missouri, Kansas and Texas Railway Company and Russell Sage and N. A. Cowdry, trustees of the Missouri, Kansas and Texas Railway Company (late Union Pacific Railway Company, Southern Branch), under and by virtue of a mortgage or deed of trust dated November 4th, 1868, and the Union Trust Company of New York, trustees under a mortgage or deed of trust executed by said railway company, dated February 1st, 1871, of the first part, and the Leavenworth, Lawrence and Galveston Railroad Company, of the second part:

Witnesseth, That whereas the said Missouri, Kan-

sas and Texas Railway Company did, on the ninth day of October, one thousand eight hundred and seventy-one, in pursuance of an agreement made and entered into by and between said last-named company and said party of the second part, and in consideration of one dollar in hand paid, grant, bargain, sell, release, and quitclaim unto the said Leavenworth, Lawrence and Galveston Railroad Company the tracts of land hereinafter described and lying and being in the State of Kansas;

And whereas said deed was executed for the purpose of partitioning said tracts of land according to the stipulations of said agreement of February 20th, A. D. 1871, and upon the understanding and according to the recital therein that the State of Kansas had received title to said lands from the United States;

And whereas it appears that the United States did not list or convey said tracts of land to the State of Kansas until subsequent to the execution of said deed of October 9th, 1871, and thus listed or conveyed said tracts by proportions and descriptions differing from those recited in the aforesaid agreement of February 20, 1871, and the deed of October 9th, 1871, and in pursuance thereof;

And whereas a doubt has arisen as to the sufficiency of said deed, and the said Leavenworth, Lawrence and Galveston Railroad Company requiring a further assurance of said land;

Now, therefore, this indenture witnesseth, that in consideration of the premises aforesaid, and for the confirmation of said deed of October 9th, 1871, as also for and in consideration of the sum of one dollar in hand paid, the Missouri, Kansas and Texas Railway Company hath granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the said Leavenworth, Lawrence

and Galveston Railroad Company, its successors and assigns, the following tracts of land lying and being in the State of Kansas, viz:

Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w ½ s e	13	24	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½ n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
N ½, s w ¼, w ½ s e & n e s e	3	26	20
All	5	26	20
E ½ n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20
All	13	26	20
All	15	26	20
All	17	26	20
E ½ n e & e ½ s e ¼	19	26	20
E ½ e ½, s w & s w s w	21	26	20
All	23	26	20
Lots 1 & 2	25	26	20
Lots 1 & 2	27	26	20
Lots 1 & 2	29	26	20
W ½ n w, s e & e ½ s e	35	25	20
S ½	19	25	21
W ½	29	25	21
All	31	25	21
All	1	26	20
W ½	5	26	21
All	7	26	21
W ½ n e ¼, w ½ s e ¼, & w ½	17	26	21
All	19	26	21
Lots 1 & 2	29	26	21

And the said party of the first part doth hereby covenant and agree to and with the party of the second part that it has not made, suffered, or caused to be made any conveyance, lien, or incumbrance of any nature whatsoever, excepting the mortgages or trust, deeds hereinbefore mentioned, on the — above-described, or any part thereof, and that it will forever

warrant and defend the title to said lands, and every part thereof, against all persons whomsoever claiming by, through, or under the party of the first part, but against none other; and the party of first part further covenants and agrees to and with the party of the second part that this instrument shall operate to convey to the party of the second part any other or further title that the party of the first part may hereafter acquire or receive through, or by or in virtue of any law of the United States, or of the State of Kansas, or treaty of the United States with any Indian tribe, to said above-described lands, or any parcel thereof, and hereby agrees, covenants, and a*grees* to execute and deliver to said party of the second part, its successors and assigns, any further assurance or conveyance which may be necessary to carry out and effectuate the object and purpose of this instrument; and the said Russel Sage and N. A. Cowdry, trustees as aforesaid, and the Union Trust Company of New York, also trustees as aforesaid, do by these presents, under and by virtue of the mortgages or trust-deeds heretofore referred to, and in consideration of the premises aforesaid, release and convey to the said party of the second part all their right, title, and interest, property, possession, claim, demand, and estate of the said trustees in and to the above granted premises in accordance with the terms and conditions of said mortgages or trust-deeds.

This release on the part of the aforesaid trustees is made for the purpose of carrying into effect a compromise or settlement of conflicting claims to portions of the mortgaged premises by said railroad companies.

In witness whereof the said Missouri, Kansas and Texas Railway Company and the Union Trust Company of New York have caused these presents to be signed by their respective presidents and secretaries,

with the seals of the respective corporations attached, and the said Russel Sage and N. A. Cowdry, trustees, have hereunto set their hands and seals the day and year first above written.

[L. S.] LEVI PARSONS,
President of the Missouri, Kansas and Texas R. R. Co.

Attest:
H. B. HENSON,
Secretary of the Missouri, Kansas and Texas R. R. Co.

[SEAL.] UNION TRUST COMPANY OF NEW YORK,
By J. N. FROTHINGHAM,
President. [L. S.]
C. T. CARLTON, *Secretary.* [L. S.]
RUSSEL SAGE, [L. S.]
N. A. COWDRY, *Trustees.* [L. S.]

(Record, pages 12 to 16.)

The following communications show the amount of land that has been patented to the Missouri, Kansas and Texas Railroad Company on account of grants by Congress to aid in the construction of its road:

Letter from General Land Office to Britton & Gray, Oct. 29, 1884.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Oct. 29, 1884.

Messrs. BRITTON & GRAY,
Attorneys for M., K. and T. R'l'y Co.,
Washington, D. C.:

GENTLEMEN: In compliance with your letter of the 28th inst. you are advised that under the grant of July 25, 1866, there were issued to the Missouri,

Kansas and Texas Railway Company the following patents:

Granted limits.

No. 6,	containing	43,794.75 acres,	Feb. 16, 1874.
No. 11,	"	1,087.05 "	Apr. 12, 1876.
No. 12,	"	871.38 "	Aug. 17, 1876.

45,753.18 acres.

Indemnity limits.

No. 3,	containing	1,720.00 acres,	Apr. 11, 1872.
No. 4,	"	114,418.12 "	June 28, 1872.
No. 5,	"	81,218.30 "	Nov. 3, 1873.
No. 6,	"	39,027.54 "	Feb. 16, 1874.
No. 7,	"	80.00 "	June 15, 1874.
No. 8,	"	80.00 "	Jan. 23, 1875.
No. 9,	"	4,555.89 "	Mar. 19, 1875.
No. 10,	"	63,986.75 "	Jan. 5, 1876.
No. 11,	"	18,817.67 "	Apr. 12, 1876.
No. 12,	"	1,433.99 "	Apr. 12, 1876.
No. 13,	"	1,582.48 "	Apr. 23, 1877.

326,920.74 acres.

Osage lands, granted limits.

No. 1,	containing	44,763.89 acres,	Feb. 19, 1872.
No. 2,	"	76,955.72 "	Feb. 26, 1872.

121,719.61 acres.

Indemnity limits.

No. 1,	containing	83,079.67 acres,	Feb. 19, 1872.
No. 2,	"	28,835.98 "	Feb. 26, 1872.
No. 7,	"	16,444.80 "	June 5, 1874.

128,360.45 acres.

By decision of the Supreme Court of the United States, at its October term, 1875, in the case of the *Missouri, Kansas and Texas Railway Company* vs. *United States* (2 Otto, 760), the title of the company to the Osage ceded lands embraced in patents numbers 1 and 2, and 1, 2, and 7, last described, was vacated.

Very respectfully,

D. HARRISON,
Acting Commissioner.

Defendant's Proof No. 19, *Exhibit B.*

Letter from General Land Office to Britton & Gray, Nov. 1, 1884.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Nov. 1, 1884.

Messrs. BRITTON & GRAY, *Washington D. C.:*

GENTLEMEN: Referring to your letter of the 31st ult., I have to advise you that lands have been certified to the State of Kansas for the benefit of the Missouri, Kansas and Texas Railway Company, under the act of March 3, 1863, and July 1, 1864, as follows:

Granted limits.

List No.	1,	cont'g	52,390.21	acres,	Dec. 23, 1871.
No.	6,	"	26,016.94	"	June 19, 1872.
J't No.	1,	"	8,500.20	"	Sept. 25, 1872.
No.	8½,	"	17,890.44	"	May 31, 1873.
No.	9,	"	18,742.75	"	May 31, 1873.
J't No.	10,	"	7,399.72	"	Oct. 16, 1873.
J't No.	4,	"	618.70	"	Feb. 11, 1875.
No.	20,	"	600.00	"	Feb. 11, 1875.

J't No. 5, cont'g	160.00	acres,	July	17, 1875.
No. 22, "	198.47	"	Dec.	22, 1875.
No. 28, "	160.00	"	May	10, 1881.
No. 29, "	200,00	"	May	10, 1881.
No. 30, "	200.00	"	May	10, 1881.

133,077.43 acres.

Indemnity limits.

List No. 2, cont'g	39,629.21	acres,	Dec.	23, 1871.
No. 7, "	40,532.43	"	June	19, 1871.
No. 8, "	27,732.50	"	Apr.	10, 1873.
No. 8½, "	52,537.72	"	May	31, 1873.
No. 9, "	800.00	"	May	31, 1873.
No. 11, "	43,617.18	"	Oct.	16, 1873.
No. 21, "	671.43	"	Dec.	22, 1875.
No. 26, "	200.00	"	Apr.	19, 1877.

205,720.47 acres.

Osage ceded lands—granted limits.

J't list No. 2, cont'g	10,545.43	acres,	June	5, 1874.
J't No. 3, "	1,324.64	"	July	23, 1874.

11,870.07 acres.

Indemnity limits.

List No. 15, cont'g	1,400.09	acres,	June	5, 1874.
No. 17, "	7,620.56	"	July	23, 1874.

Total, 9,020.65 acres.

Recapitulation.

Granted limits	133,077.43	acres.
Indemnity limits	205,720.47	"
Osage ceded lands, granted limits	11,870.07	"
" " " indemnity "	9,020.65	"
Total	359,683.62	acres.

By decision of the Supreme court of the United States, at its October term, 1875, in the case of the *Missouri, Kansas and Texas Railway Company* vs. *United States* (2 Otto, 760), the title of the company to the lands in the Osage ceded Reservation, embraced in lists 15 and 17, and joint lists 2 and 3, was vacated.

Very respectfully,

J. D. SMITH,
Acting Commissioner.

(Rec., pages 68 to 71.)

On entering the decree appealed from, Brewer, J., delivered the following opinion:

BENJ. H. BREWSTER, ATT'Y-GEN'L, &c.,
vs.
THE KANSAS CITY, LAWRENCE AND Southern Railroad Company.

This is a proceeding in equity to set aside the patent to a body of land in Southern Kansas. There can be no question of the right of the Government to maintain such a suit when either the ministerial officers have issued a patent for lands not subject to a patent or not within the scope of the grants made by Congress (*United States* vs. *Stone*, 2 Wall, 525; *Leavenworth, L. and G. R. Co.* vs. *United States*, 92

U. S., 740); or when such officers have been imposed upon by false and fraudulent representations. (*United States* vs. *Minor*, 114 U. S., 233, Sup. Ct. Rep. 836.) A case involving the title to the same lands was before the supreme court of Kansas when I was a member of that court, and the conclusion then reached was adverse to the title of the defendant here. (*Neer* vs. *Williams*, 27 Kan., 1.) So far as any matters were considered by that court I shall say nothing, but refer simply to the opinion I then wrote. I see no reason to doubt the correctness of the views then expressed. That case was submitted upon an agreed statement of facts, *some of which are now not only not admitted, but vigorously and successfully disputed.* This change calls for an examination of certain questions not heretofore considered by me. In view, however, of the similarity in many respects, and also of the further fact that the magnitude of the interests involved will inevitably send this case to the court of last resort, I forbear any lengthy recital or discussion. I simply state very briefly the conclusions to which, upon the facts as they now appear, I have arrived.

The legal title must first be examined. That consists of a patent from the State of Kansas, dated May 19, 1873, based upon a certificate to the State from the Commissioner of the General Land Office. Both certificate and patent recite that the lands passed under the grant of March 3, 1863. Upon that act, therefore, rests the legal title. The beneficiaries of the two grants of that act were as named by the State, the Leavenworth, Lawrence and Galveston Railroad Company and the Atchison, Topeka and Santa Fé Railroad Company. Of the first, nothing need be said, as nothing is claimed. To the second were granted lands for building a railroad from Atchison southwestwardly with a branch from its cross-

ing of the Neosho, down the valley of the Neosho to the point where the Leavenworth, Lawrence and Galveston Railroad should enter the valley. In July, 1864, a further grant was made to the State to aid in the building of a road from Emporia, the Atchison, Topeka and Santa Fé crossing of the Neosho, northwestwardly to the Union Pacific road at or near Fort Riley. And again, in July, 1866, an act was passed by Congress granting directly to what is now known as the Missouri, Kansas and Texas Railroad Company, lands to aid in building a road from Fort Riley southeasterly, and down the Neosho Valley to the southern boundary of the State of Kansas. The line of this road was, therefore, for part of its distance, substantially the same as that of the branch of the Atchison, Topeka and Santa Fé above referred to. In March, 1866, the Atchison, Topeka, and Santa Fé assigned its franchise and grant in respect to this branch to the Missouri, Kansas and Texas, and in January, 1867, this assignment was ratified by the State.

The Atchison, Topeka and Santa Fé never did anything toward building this branch, but the Missouri, Kansas, and Texas constructed its entire road from Fort Riley down the Neosho Valley. Could it claim any benefit of the grant to aid in building the branch? Generally speaking, I think it correct to say that when by separate acts at different sessions of Congress lands are granted to two different corporations or parties to aid in building lines of road, with the same general course or direction, by no arrangement between such corporations or parties, can the building of only one road secure the benefits of both grants. Unless an intent to the contrary is plainly disclosed by the language of one or the other of the acts of Congress, it will be presumed either that the latter grant superseded the former, or else that two

roads must be built to earn the two grants. Such views accord with the rule that grants are to be construed in favor of the Government and against the grantee, and also with the policy of the Government to secure the public lands to actual settlers, except in those cases in which the importance of some public improvement justifies the public aid.

But beyond this general view and sustaining it, may be noticed these facts: The act of 1863 provides for a "branch" down the Neosho Valley, and not an independent cross-road. Perhaps it would be giving undue importance to the word "branch" to hold that its use concludes the question, and yet it is certainly significant of the intent of Congress. Obviously that body contemplated a single trunk line running southwestwardly through the State, with a branch down the Neosho Valley, all under one management and control. Again, the third proviso to the granting section in the act of 1863, reads: "Provided, also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress." Now the date from which the term "previous" relates may be the date of the act itself, or the time at which the State should name the beneficiary, or it may well be the time of the actual construction of the road. A positive determination of the date intended is unnecessary. All that I notice it for is because it emphasizes the intent of Congress against the doubling of grants upon a single road. Still, again, when the act of 1866 was before the Senate for consideration, reference was made to the grant of 1863, and the tenor of the discussion shows that it was understood that the proposed act was to supersede all other acts and to be the only living operative

grant of lands to aid in building a road down the valley of the Neosho.

These are the principal considerations which impel to the conclusion that the Missouri, Kansas and Texas, by building its road down the Neosho Valley, took nothing under the act of 1863. Of course this destroys the legal title, for the act of 1863 alone provided for certification to the State. But it is earnestly insisted that though the legal title may fail, yet equitably the Missouri, Kansas and Texas was entitled to the lands, and therefore equity will not interfere. Doubtless if the premise is true, the conclusion will follow. This presents to my mind the most difficult question in the case, and one upon which I have slowly and hesitatingly come to a conclusion. I premise this as the correct rule applicable to this branch of the case. When the legal title fails, the defendant may defeat the action by proof that the equitable title to the very lands is with it, but not by proof that it had an unadjusted equitable claim upon the Government for an equal quanity of unselected lands.

The act of 1866, as heretofore stated, made a direct grant to the railroad company. It provided for patents from the Government to it. It granted lands in place and provided for indemnity lands to be selected by the Secretary of the Interior. The lands in controversy are not part of the lands in place, but are within the indemnity strip.

Were they ever selected as indemnity lands under the act of 1866? Respondent claims that they were, but the evidence does not satisfy me of the fact, but rather indicates the contrary. It is true that in August, 1872, the Leavenworth, Lawrence and Galveston, and the Missouri, Kansas and Texas Companies filed a joint claim for these lands as indemnity lands, in which the former company claimed under the act

of 1863 and the latter under both the acts of 1863 and 1866; but the Commissioner of the General Land Office recognized the claim as under the act of 1863 alone, and certified the lands to the State. This was done in April, 1873. But for the reasons given heretofore, I think the Missouri, Kansas and Texas Company had no valid, legal, or equitable claim under the act of 1863. But it is said that under the act of 1866 it did have a valid claim, and that the mistake of the Commissioner in naming the statute does not destroy equitable rights. But how can it be inferred that the Secretary of the Interior would have recognized any claim under the act of 1866, or recognizing it, made a selection of these lands in satisfaction thereof?

It does not seem to me that, under the testimony, it can be said that the Commissioner would or ought to have selected these lands. Indeed, I cannot see how the company was entitled to so large a body of lands as was in fact patented and certified to it. Counsel say that it was entitled to 819,200 acres at least, and received title to only 712,000. It may be true that that is all to which it has received a good title; but beyond this, 270,970 acres of Osage ceded lands were patented or certified to it, and at the time of this application and selection, in 1872 and 1873, the title of the road thereto was, in the Interior Department at least, supposed to be perfect, for not until the October term, 1875, of the Supreme Court was the title to these lands declared void, and of the 712,000 acres to which it had a perfect title, no more than 86,000 acres were conveyed after such decision. So that whatever claim for lands the company may now have, a claim which perhaps has recognized force only since the above decision, I do not think it can be said to have a valid equitable title to these lands, and the court may not take the place of the Depart-

ment and make a selection. As I said before, this part of the case presents the most doubtful and embarrassing question; but my conclusion is as above, and the decree must go as prayed for.

[Statement by appellants, pages 71 to 76.]

12-682

Office Supreme Court U. S.
FILED.
OCT 12 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 749.

THE KANSAS CITY, LAWRENCE and SOUTHERN KANSAS RAILROAD COMPANY

v.

BENJAMIN HARRIS BREWSTER, Attorney-General, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY TO THE BRIEFS FOR APPELLANT.

WILLIAM LAWRENCE,
Of Counsel.

DUDLEY PRESS, PHILADELPHIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS RAILROAD COMPANY

v.

BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL, &C.

No. 749.

Appeal from the Circuit Court of the United States for the District of Kansas.

REPLY TO THE BRIEFS FOR APPELLANT.

In addition to what has been said in the briefs filed in this case on behalf of the United States, it is deemed proper to discuss a little more fully some of the points therein presented, *to wit:*

I. EVEN IF THE M., K. & L. COMPANY COULD, BY THE CONSTRUCTION OF ITS TRUNK LINE OF ROAD FROM EMPORIA "TO THE POINT WHERE THE L., L. & G. ROAD ENTERS *the said Neosho Valley*," claim land-grant rights under the act of March 3, 1863, as and for the Emporia Branch, yet it has

failed to make a road *to such point* and so has no *such* rights.

II. UNDER THE ACT OF JULY 26, 1866, THE M., K. & T. CO. HAS NO LAND-GRANT RIGHTS WITHIN THE TWENTY MILES OF THE GRANTED LIMITS OF THE UNION PACIFIC R.R. CO., EASTERN DIVISION, NOR WITHIN THE TWENTY MILES OF GRANTED LIMITS OF THE A., T. & S. F. CO., THROUGH BOTH OF WHICH GRANTED LIMITS THE M., K. & T. ROAD PASSES, AND FOR THIS REASON, IN ADDITION TO OTHERS, SAID COMPANY HAS RECEIVED MORE LANDS THAN IT IS ENTITLED TO.

III. THE BILL IS SUFFICIENT IN FORM.

I. THE M., K. & T. CO. DID NOT CONSTRUCT ITS LINE OF ROAD TO THE POINT WHERE THE L., L. & G. ROAD ENTERS THE NEOSHO VALLEY.

In ADDITION to what has been said in the original briefs for the United States, it is proper to call *more particular* attention to some matters in this connection. The act of 1863, as repeatedly stated, requires the A., T. & S. F. road to be constructed:

"WITH A BRANCH *from where the last-named road* [the A., T. & S. F.] *crosses the Neosho* (Emporia) DOWN SAID NEOSHO VALLEY TO THE POINT *where the said first-named road* [L., L. & G. road] ENTERS *the said Neosho Valley*."

The L., L. & G. road "enters the said Neosho Valley" on the NORTHEAST SIDE of the river.

At page 30 [53] of the printed record in this case is a certified diagram of the M., K. & T road, with the location of the Neosho river, the point where the L., L. & G. road first *intersects the river*, and the point where the M., K. & T. road intersects the L., L. & G. road, and it is shown By this diagram and by a comparison with other maps on

file that the M., K. & T. road *intersects the L., L. & G. road* TWELVE MILES south of the point where the L., L. & G. road first touches and crosses the river, AND on the OPPOSITE SIDE OF THE RIVER. If, therefore, the *point* where the L., L. & G. road *first touches the river on its north side,* and then crosses it, be regarded as the point where, on said north side, it "*enters the valley,*" the point of intersection of the two roads is twelve miles too far south. But it would be a mockery of terms and a stultification of the facts to claim or concede that the point where the L., L. & G. road *crosses* the river is the point where it *enters the valley.* It *enters* the valley away north of that. *How* far is not material. Congress said *that point* should be intersected by the branch road. Nor is it at all correct to say that the Commissioner of the General Land Office ever sanctioned, or could sanction, the crossing of the roads as constructed. His letter of September 15, 1870, (printed Record 74 [139,]) says:

"It is thus evident that in the use of the term 'Neosho Valley' Congress and the State had in view the *lowest portion of the valley,* [the act says *the valley*—not the *lowest portion* of the valley,] or *that part nearest to the river available for railroad purposes,* and that the point where the first-named road [L., L. & G.] *enters* the Neosho Valley 'is the point where it reaches or crosses the river, and that the grant of 1863 for the branch road would reach to this point.'"

This is not remarkably clear in its meaning.

"The *lowest portion* of the valley, or that PART [of the valley] nearest to the river available for railroad purposes,"

may be *many miles wide.* The expression, "that part," [of the valley] implies that there were *other* parts than

that immediately on the river bank. The road of the M., K. & T. Co. does not even reach "THAT PART." If—

"The point where it [the L., L. & G. road] REACHES * * the river"—

is the true point, the M., K. & T. road does not even *reach* that. The L., L. & G. road reaches the river on its northeast side. HOW WIDE the river is does not appear. It may be, and in some periods of the year probably is, like the Missouri or the Platte, *some miles wide.*

But, if we even accept the absurd theory that the point where the L., L. & G. road "*reaches*" the river is the true point, it still follows that the point of intersection of the two roads is still twelve miles too far south, and on the wrong side of the river. The distance is not material—*a* mile away is as fatal as a distance of twelve miles.

The intersection ON THE WRONG SIDE OF THE RIVER is as fatal as a distance of twelve miles. Congress intended the intersection to be on the northeast side of the river, to *give the public* and *the Government*, for its transportation of mails, troops, and property, the advantage of that side of the river with the necessary depots and accommodations of an intersection *there*, and without crossing the river to reach them on the other side. Thus Kent, in discussing the "execution of powers," says:

"It is the plain and settled rule that the conditions annexed to the exercise of the power *must be strictly complied with*, however *unessential* they might have been if no such precise directions had been given. They *are incapable of admitting* any *equivalent* or *substitution*, for the person who creates the power has the undoubted right to create what checks he pleases to impose to guard against a tendency to abuse. (4 Kent, 330.)"

And if it were possible to admit of any *equivalent*, or *departure*, the *onus* is on the R.R. Co. to show authority for, or justify the departure by, evidence; and there is none such.

When the departure is shown—as it is—*all rights*, DEPENDENT on making a connection at the point required by Congress fail, unless a clear express authority or justification is shown; and there is none.

But "the valley" does not *begin* where the L., L. & G. road *reaches* the river. To say that it does is to make the word "valley" and "river" have the same meaning, which is absurd. To say that a road "enters a valley" where "it reaches or crosses the river," is to say there is no valley but the river itself is the valley. If Congress had intended the roads to intersect at the point where the L., L. & G. road "reaches the river," the act of Congress would have said so. Congress knew the difference between the river and the valley of the river. The "valley" cannot *begin* on the river bank, for that is the line where the valley *terminates*. The Commissioner might as well have said the valley begins *ad filum aquæ*.

Suppose Congress had made a *land grant* to a railroad company, to *include the valley of the river*, would some *disinterested* officer of the Land Department construe this to include only the land "*nearest* to the river available for railroad purposes," or, still worse, only the land beginning where the road "*reaches* or crosses the river," and extending to low-water mark?

The act fixes the point where the L., L. & G. road "*enters* the valley," not, as the Commissioner says, at "the *lowest portion* of the valley," nor yet, as the Commissioner says, at "*that part* nearest to the river available for railroad purposes."

By what authority does the Commissioner *interpolate*

these words? Congress did not use them. Wherever the L., L. & G. road enters the valley is the true point —the *first part* of the valley which is *the place* "*from which the natural flow of water is by* way of the Neosho River."

If there can be *doubt* about this, it is to be resolved so as to exclude the largest amount of lands from grant under the act of 1863, which requires the point to be fixed as stated.

The *effect* of calling the *river bank* the *point of entering* the valley was to give the Railroad Company *land-grant claims*, if not *rights*, some twenty-eight miles *farther south* under the *earlier* act of March 3, 1863, thus cutting off the homestead and pre-emption claims of settlers between that date and the *location* of the road under the act of July 26, 1866.*

II. THE FACT IS PROVED IN THIS CASE THAT THE M., K. & T. CO. HAS RECEIVED MORE LAND THAN IT IS ENTITLED TO.

MATERIAL FACTS.

The road of the M., K. & T. Co. is 128 miles long from Fort Riley to the north boundary of the Osage Indian reservation. It is not entitled to lands south of the

* The *diagram* of the M., K. & T. road, referred to above, is the map of definite location of the road. It is to be presumed the road was made, as the law required it to be, on the line of definite location. This is *prima facie* evidence that it was so made.

The map of Kansas shows that the M., K. & T. road crosses the L., L. & G. road about three or four miles south of the point where the L., L. & G. road crosses the river. If so, even this departure is as fatal as twelve miles. And a constructed line of road which *deflects* eight or ten miles from its line of definite location is not entitled to any land grant or indemnity rights.

If the question of the point of intersection should become a turning point in the case, and there should be doubt about it, the Court would remand the case to the Circuit Court for proof.

northern boundary. (L., L. & G. Co. *v.* U. S., 92 U. S., 733.)

The M., K. & T. road for the first *twenty miles* south of Fort Riley *passes through the land-grant* limits of the Union Pacific R.R. Co., Eastern Division. (Act of July 2, 1864, 13 Stat., 356; *M., K. & T. Co.* v. *Kansas Pacific Co.*, 97 U. S., 494.)

It also passes through *twenty miles* of the *land-grant limits* of the A., T. & S. F. road. (Act March 3, 1863, 12 Stat., 772.) Thus for *forty* of the *one hundred and twenty-eight* miles of road it passes through lands, *all the odd sections* in which had been *previously granted* to the two railroad companies named.

LEGAL CONCLUSIONS.

Now the statute and authorities show that the M., K. & T. Co. received no grant of lands within the forty miles mentioned, and is not entitled to any indemnity lands for those portions of its road.

(1.) *This is the effect of the words of the statute.*

The act of July 26, 1866, (14 Stat., 289,) provides that:

"There is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile."

If this *stood alone* it would be on its face a grant of five *odd-numbered sections* on each side of the road from Fort Riley to the Osage Indian reservation. But this grant is *qualified* and *limited* by the same act in the same section as follows:

Provided, That any and ALL LANDS HERETOFORE RESERVED to the United States by any act of Congress, or IN ANY other

MANNER BY COMPETENT AUTHORITY FOR the PURPOSE of AIDING IN ANY OBJECT OF INTERNAL IMPROVEMENT or other purpose whatever, be, and the same ARE HEREBY, RESERVED AND EXCEPTED FROM THE OPERATION OF THIS ACT, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right-of-way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States.

That is, the *grant* does not extend to the odd sections which had been *previously granted* to the Union Pacific R. Co., Eastern Division, and to the A., T. & S. F. Co. *These* lands are RESERVED and *excepted* "FROM THE OPERATION OF THE ACT" of July 26, 1866. This latter act *makes no grant*, and hence *gives no indemnity* rights within the *granted limits* of the two roads mentioned.

The lands so *previously granted*, are expressly "RESERVED [FROM] AND EXCEPTED FROM [OUT OF THE GRANT] THE OPERATION [GRANT] OF THIS ACT."

This Court has so decided.

Thus, in *L., L. & G. R.R. Co.* v. *U. S.*, (92 U. S., 247,) it is said :

"Every tract [of land previously] *set apart for special uses* [as lands previously granted for the use of a railroad] is RESERVED to the Government to enable it to enforce them. There is no difference in this respect, whether it be *appropriated* for Indian *or* OTHER PURPOSES. There is an equal *obligation* resting on the Government to require that neither *class* of RESERVATIONS be diverted from the uses to which it was assigned." * * *

"Whatever is *included* in the *exception* is *excluded* from the *grant*. * * * What is not given expressly, or by necessary implication, is *withheld*. * * * Congress could not be supposed to have * * * intended to in-

clude [in the grant] the land previously appropriated to another purpose." (*Id.*, 740.)

And in *Newhall* v. *Sanger*, (92 U. S., 762,) the same principle is announced.

The Court, in considering "the subject of grants" and referring to the preceding case, said:

"We held that they [grants] did not embrace tracts RESERVED by competent authority for *any purpose*, or in any manner, although no exception of these was made in the grants themselves; and we confined a grant of every alternate section of 'land' to *such* whereto the *complete title was absolutely vested in the United States.*"

The provision for *indemnity* in the act of July 26, 1866, is as follows:

But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, GRANTED AS AFORESAID, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid.

Now, as the act only gives indemnity for lands which were "GRANTED AS AFORESAID" by the act, but *lost* to the Company subsequently by *sale*, or *homestead*, or *pre-emption entries*, the act does not give "lieu" or "indemnity lands" in place of lands *never granted*, but expressly RESERVED from the grant.

This is the clear meaning of the words of this statute, and if there can be doubt as to that it is to be resolved against the Company.

(2.) *This is the view supported by authority.*

In the case of the *L., L. & G. R.R. Co.* v. *U. S.*, (92 U. S., 749,) Mr. Justice Davis, in discussing the *indemnity clause* of a similar act, said:

(1.) "The words employed [in the indemnity clause] show clearly that its only purpose is to give sections beyond that [ten mile] limit for *those lost* within it by the action of the Government *between the date of the grant and the location of the road.* This construction gives effect to the whole statute, and makes each part consistent with the other.

(2.) "But even *if the clause were susceptible of a more extended meaning* IT IS STILL SUBJECT TO, AND LIMITED BY, THE PROVISO WHICH EXCLUDES ALL LANDS RESERVED AT THE DATE OF THE GRANT and NOT SIMPLY *those found to be reserved when the line of the road shall be definitely fixed.* The latter contingency had been provided for in the [indemnity] clause, and if the *proviso* did not take effect until that time it would be wholly unnecessary."

This opinion seems to receive some sanction in the later case of *U. S.* v. *Burlington, &c. R.R. Co.*, (98 U. S., 339,) in which it is said:

"That nearly all, perhaps all, other grants of land in aid of the construction of railroads, prescribe a lateral limit within which the [indemnity] land is to be selected; *and provide for the selection of land elsewhere to make up any deficiency arising from the disposition of a portion of it within such limit*, BETWEEN THE DATE OF THE ACT AND THE LOCATION OF THE ROAD."

So much of the opinion in *L., L. & G. Co.* v. *U. S.* as says that indemnity lands can only be given for lands

"LOST," that is, *sold* or taken by *homestead* or pre-emption entries, within granted limits—

"By the action of the government *between the date of the grant and the location of the road*"—

has been criticised and said to be "*mere dictum.*"

Att'y-Gen'l Devens, June 5, 1880, 16 Opinions, 512; Winona & St. Peter R.R. Co. *v* Barney, 113 U. S., 627.

But the *other declaration* of Justice Davis remains unquestioned, to wit, that the indemnity clause—

"IS STILL SUBJECT TO AND LIMITED BY THE PROVISO WHICH EXCLUDES ALL LANDS RESERVED AT THE DATE OF THE GRANT, and *not simply those found to be reserved when the line of the road shall be definitely fixed.*"

That is, NO INDEMNITY IS TO BE GIVEN FOR LANDS WITHIN GRANTED LIMITS WHICH WERE RESERVED *at the date of the grant.* The lands *previously* granted in aid of the two companies mentioned were expressly reserved from the grant of the act of July 26, 1866.

This was distinctly the view of the Attorney-General, although he held that other language of Justice Davis was *mere dictum*, as stated.

Thus, Attorney-General Devens, in his opinion of June 5, 1880, (16 Op., 513,) on the indemnity clause of the act of March 3, 1857, (ch. 99, 11 Stat., 195,) said:

"It gives the company NO TITLE TO INDEMNITY for LANDS RESERVED FROM AND EXCEPTED OUT OF THE GRANT, but does entitle it to indemnity when within the granted limits there are found lands which have been *sold* by the United States, or PRE-

EMPTED, whether such *sale* or *pre-emption took place prior or subsequently to the passage of the act of* 1857, and prior or subsequently to the definite location of the road. But this *indemnity can be carried no further* than to compensate the railroad for THE lands which it has THUS *lost*."

If it should now be held, *for the* FIRST *time*, that indemnity lands are to be given for lands expressly excepted from grant—that is, for "RESERVED" lands—the effect will be to entirely *reverse* the decision of the court in the case of *L., L. & G. Co.* v. *U. S.*

The effect will be that every railroad company, along whose line of road there have been *Indian* or OTHER reservations, or lands reserved for other purposes, will yet be entitled to indemnity for lands so reserved. The effect of such a decision cannot well be estimated.

And it is respectfully submitted that the principle thus announced as to *reserved lands* is not disturbed, but rather affirmed, by this Court per FIELD, *Justice*, in *Winona & St. Peter R.R. Co.* v. *Barney*, (113 U. S., 624.)

In that case it appeared that the act of March 3, 1857, (11 Stat., 195,) granted lands to the Territory of Minnesota in aid of the construction of certain roads, and gave indemnity rights. The Winona & St. Peter R.R. Co. succeeded to the rights of one of these companies. The act of March 3, 1865, (13 Stat., 526,) enlarged the grant from six to ten sections per mile, with indemnity limits twenty miles. PRIOR to the act of 1865 a grant had been made to aid in the construction of the Minnesota and Cedar Valley Railroad, "of lands *located within the limits covered by said extension* grant."

A question arose as to indemnity rights under the act of 1857, and the Court *held*—as the syllabus of the case says—

"That the grant by the act of 1857 was a grant of lands *in place*, and not of *quantity*."

And it was *held:*

"That the indemnity clause in this act [of March 3, 1857] covers losses from the grant by reason of SALES, and the ATTACHMENT OF PRE-EMPTION rights *previous to the date of the act*, as well as by reason of sales and the attachment of pre-emption rights between that date, and the final determination of the route of the road."

But it is *not said* that a company is entitled to *indemnity* for lands within the limits of its grant, which had been *previously granted to* another company, and which were thereby *reserved* from the later grant.

The lands of the Minnesota & Cedar Valley Company, at its intersection with the Winona & St. Peter R.R. Co., were located within the limits of the extension made by the act of 1865 to the original grant of 1857.

A question arose as to which of the two companies was entitled to the lands included in the extension grant, and the Court *held*—

"That when the earlier grant to aid in the construction of the Minnesota & Cedar Valley Railroad interferes with the extension grant, * * * the earlier grant takes the land."

The earlier grant *reserves* the land from the later grant. And it is not said at all that indemnity is to be given to a later company for lands it earns within its granted limit by a previous grant or reservation.

(3.) *This is further shown by the whole purpose and policy of the land-grant system.*

It contemplates *benefits* to be derived to the United States by *reserving* alternate sections to be enhanced in value. It

establishes the policy of *alternation*. It would extend this argument too far to fully discuss this subject. It is sufficient to refer to the decision of the Secretary of the Interior of June 16, 1886, (Copp's Land-Owner, July 15, 1886, vol. xiii, No. 8, p. 92;) to the arguments on file in the Interior Department on which that decision was made, and to *Rogers* v. *Atlantic & Pacific R.R. Co.*, (Copp's Land-Owner, Sept. 15, 1886, vol. xiii, No. 12, p. 135.)

It follows that the M. K. & T. Co. received no land grant or indemnity rights within either the twenty-mile granted limits of the Union Pacific R.R., Eastern Division, or within the twenty-miles of granted limits of the A. T., & S. F. Co.

THE RESULT.

The length of road of the M., K. & T. Co. from Fort Riley to the north boundary of the Osage ceded lands	128 miles.	
Deduct the granted limits of the two roads mentioned	40 miles.	
Length of M., K. & T. road entitled to grant or indemnity	88 miles.	
This at ten sections, or 6,400 acres per mile, gives as land grant and indemnity rights	563,200	acres
The Record (Print 68–71, [129–132]) and the Annual Report of the Commissioner of the General Land Office for 1885, (page 191,) show (Table, page 56, 57) that there have been patented to or certified in favor of the M., K. & T. Co., after deducting lands lost by decision of *L., L. & G. Co.* v. *U. S.*, 712,975.18 acres, or as stated in brief for the Company filed in this case, p. 46	796,924.14	"
Then the Company has received an excess of	233,824.14	"

In addition to this the M., K. &. T. Co. is not entitled to a land grant for that portion of its road south of Emporia, covered by the grant of 1863, in favor of the A., T. &. S. F., Emporia Branch. This will further reduce the grant and increase the excess of lands already received by the M., K. & T. Co.

It may have been that it was upon these or similar considerations that the learned judge who decided this case in the Circuit Court said:

"Indeed, I cannot see how the Company was entitled to so large a body of land as was in fact patented and certified to it."

The conclusion is inevitable that the M., K. & T. Co. has received *more lands* than it can lawfully claim either at law or in equity.

III. The bill is sufficient in form.

The bill alleges the title of the United States in the lands in controversy, and that an adverse claim is made under the statutes and proceedings recited which give no title. It is not necessary to set out evidence in the bill or argue the effect of the law and proceedings.

If the United States has not been lawfully divested of its title, the Court will not refuse relief on a mere question of pleading.

If it were necessary—as it is not—any proper amendment would be permitted, and the case would be remanded for that purpose.

Respectfully submitted.

WILLIAM LAWRENCE,
of Counsel.

OCTOBER 12, 1886.

ERRATUM.—On page 3 of the original brief in this case after the word "Arkansas," in sixth line from the bottom, insert, "and to secure this object passed the act of July 26, 1866."